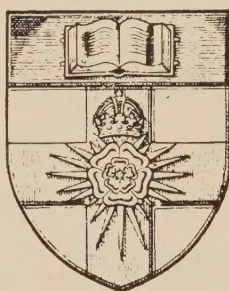


**THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY**

346-4 Mx North



UNIVERSITY OF LONDON
LIBRARY



Digitized by the Internet Archive
in 2026

THE IRISH REPORTS.

IRISH REPORTS 1894-

REPRINT 1976

Printed and Published
in Great Britain by
Professional Books Limited,
of Milton Trading Estate,
Milton, Abingdon, Oxon.



PROFESSIONAL BOOKS LIMITED

THE IRISH REPORTS,

PUBLISHED UNDER

THE CONTROL OF THE INCORPORATED COUNCIL OF LAW REPORTING FOR IRELAND:

CONTAINING

REPORTS OF CASES ARGUED AND DETERMINED

IN

THE COURT OF APPEAL,

THE HIGH COURT OF JUSTICE,

THE COURT FOR CROWN CASES RESERVED,

IN IRELAND,

AND

THE IRISH LAND COMMISSION.

EDITED BY

WILLIAM GREEN,

BARRISTER-AT-LAW.

1904.

VOL. I.

CHANCERY DIVISION AND LAND COMMISSION.

DUBLIN:

PUBLISHED FOR THE INCORPORATED COUNCIL OF LAW REPORTING FOR IRELAND,

BY EDWARD PONSONBY,

116, GRAFTON STREET.

1904.



DUBLIN :

PRINTED FOR THE INCORPORATED COUNCIL OF LAW REPORTING FOR IRELAND,

At the University Press,

BY PONSONBY AND GIBBS.

Lord Chancellor.

THE RIGHT HON. LORD ASHBOURNE.

Lords Justices of Appeal.

THE RIGHT HON. GERALD FITZ GIBBON.

THE RIGHT HON. SAMUEL WALKER.

THE RIGHT HON. HUGH HOLMES.

Chancery Division.

THE RIGHT HON. SIR ANDREW MARSHALL PORTER, BART., M.R.

THE RIGHT HON. HEDGES EYRE CHATTERTON, V.-C.

THE HON. DUNBAR PLUNKET BARTON.

Land Judge.

THE RIGHT HON. JOHN ROSS.

Irish Land Commission : Judicial Commissioners.

THE HON. R. E. MEREDITH.

THE HON. GERALD FITZ GERALD.

Attorney-General.

THE RIGHT HON. JOHN ATKINSON.

Solicitor-General.

JAMES H. CAMPBELL, K.C.

[These Reports will be cited as follows :—[1904] 1 I. R.]

REPORTERS.

Court of Appeal, . . { ROBERT D. MURRAY, } Barristers-at-law.
G. Y. DIXON, }

Master of the Rolls, . { WILLIAM LAWSON, } Barristers-at-law.
R. W. LUCAS, }

The Vice-Chancellor & { D. M'C. MAHONY, } Barristers-at-law.
Mr. Justice Barton, { JOHN MACMAHON, }

Land Judge, and } WILLIAM C. STUBBS, Barrister-at-law.
Land Commission, }

IN the Christmas Vacation, 1903-4, the Right Hon. the Vice-Chancellor resigned. On the 13th January, 1904, the following Resolution was passed by the Bar :—

“That the Bar of Ireland, assembled in General Meeting, desire, on the occasion of the retirement of the Right Hon. HEDGES EYRE CHATTERTON from the position of Vice-Chancellor of Ireland, to express our appreciation of the high qualities displayed by him during his long judicial career, and to tender our good wishes on his retirement.”

IN Hilary Sittings, 1904, the Hon. DUNBAR PLUNKET BARTON, one of the Judges of the King's Bench Division, was transferred to the Chancery Division in place of the Right Hon. the Vice-Chancellor.

TABLE OF CASES REPORTED

IN THIS VOLUME.

A.	PAGE		PAGE
Allison <i>v.</i> Jenkins,	341	Cantrell & Cochrane <i>v.</i>	
Annesley, Irish Land Com-		Murphy & Bradshaw, 310, 321	
mission <i>v.</i>	272	Coleman, Petitioner; <i>In re</i>	
Attorney-General (Cork Co.		Leader's Estate,	368
Council) <i>v.</i> Perry,	247, 252	Connolly <i>v.</i> Barter,	130, 146
(Boswell)		Cullen and Rial's Contract,	
<i>v.</i> Rathmines and Pem-		<i>In re,</i>	206
broke Joint Hospital		Cullinan, Byrne <i>v.</i>	42
Board,	161, 171		
		D.	
B.		DeFreyme (Lord) <i>v.</i> Fitz-	
Balfe <i>v.</i> Halpenny,	486	gibbon (No. 1),	400, 428
Barter, Connolly <i>v.</i>	130, 146	— <i>v.</i> — (No. 2),	429
Belshaw <i>v.</i> Rollins,	284	Durrow Brick and Tile	
Berridge, Landlord; Folan,		Works Co., <i>In re,</i>	530
Tenant,	20		
Blake's Trusts, <i>In re,</i>	98	E.	
Bobbett's Estate, <i>In re</i> ;		Ely's (Marquis of) Estate,	
Nugent, Petitioner,	461	<i>In re,</i>	66
Bogue and Waldron's Con-		Ewing, Yool <i>v.</i>	434
tract, <i>In re,</i>	240		
Bomford's Estate, <i>In re,</i>	474, 480	F.	
Bourke <i>v.</i> Lee,	280	Findlater <i>v.</i> Lowe,	519
Bradshaw, <i>In re,</i>	18	Fitzgibbon, DeFreyme (Lord)	
Browne <i>v.</i> Browne,	299	<i>v.</i> (No. 1),	400, 428
Byrne <i>v.</i> Cullinan,	42	— <i>v.</i> (No. 2),	429
		Folan, Tenant; Berridge,	
C.		Landlord,	20
Caldwell, Landlord; Kil-		Foy, Tenant; Montgomery,	
Kelly, Tenant,	550, 559	Landlord,	4, 7

G.	PAGE
Garde's Estate, <i>In re</i> ,	237
Garland <i>v.</i> Smyth,	35, 41
Gibbings <i>v.</i> Hungerford and Cork Corporation,	211
Grady, Welwood <i>v.</i>	388

H.	
Hallinan's Trusts, <i>In re</i> ,	452, 460
Halpenny, Balfe <i>v.</i>	486
Hanna, Jennings <i>v.</i>	540
Hayden, <i>In re</i> ,	1
Horrigan <i>v.</i> Horrigan,	29, 271
Hungerford and Cork Cor- poration, Gibbings <i>v.</i>	211
Hurley, Secretary of State for War and, Contract of,	354

I.	
Iever's Settlements, <i>In re</i> ,	492
Irish Land Commission <i>v.</i> Annesley,	272

J.	
Jenkins, Allison <i>v.</i>	341
Jennings <i>v.</i> Hanna,	540

K.	
Kemmis' Estate, <i>In re</i> ,	496, 500
Kilkelly, Tenant ; Caldwell, Landlord,	550, 559
Kilkenny Corporation, <i>In re</i> ; <i>Ex parte</i> Shortal,	570

L.	
Lahiff, <i>In re</i> ,	147
Lawder, Russell <i>v.</i>	328
Leader's Estate, <i>In re</i> ; Coleman, Petitioner,	368
Lee, Bourke <i>v.</i>	280

	PAGE
Lee, Tenant ; Nolan, Land- lord,	20
Long (deceased), <i>In re</i> ; Long <i>v.</i> Long,	120
Lowe, Findlater <i>v.</i>	519

M.	
M'Carthy <i>v.</i> M'Cartie,	100, 113
M'Causland <i>v.</i> O'Callaghan,	376
M'Evilly, Thwaites <i>v.</i>	310, 321
M'Glynn, Moore <i>v.</i>	334, 340
MacPhail <i>v.</i> Phillips,	155
Montgomery, Landlord ; Foy, Tenant,	4, 7
Moore <i>v.</i> M'Glynn,	334, 340
Murphy & Bradshaw, Can- trell & Cochrane <i>v.</i>	310, 321

N.	
Neill <i>v.</i> Neill,	513
Nolan, Landlord ; Lee, Tenant,	20
Nugent, Petitioner ; <i>In re</i> Bobbett's Estate,	461

O.	
O'Callaghan, M'Causland <i>v.</i>	376
O'Halloran, Sexton <i>v.</i>	123
O'Neill, Stewart <i>v.</i>	87

P.	
Perry, Attorney-General (Cork Co. Council) <i>v.</i>	247, 252
Phillips, MacPhail <i>v.</i>	155

R.	
Rathmines and Pembroke Joint Hospital Board, Attorney-General (Bos- well) <i>v.</i>	161, 171

	PAGE	T.	PAGE
Rial and Cullen's Contract,			
<i>In re</i> ,	206	Thwaites v. M'Evilly,	310, 321
Rollins, Belshaw v.	284	Trench v. Wallace,	290
Russell v. Lawder,	328		
		W.	
		Waldron and Bogue's Con-	
		tract, <i>In re</i> ,	240
S.		Wallace, Trench v.	290
Secretary of State for War		Welwood v. Grady,	388
and Hurley's Contract,	354	Wright v. Wright,	360
Sexton v. O'Halloran,	123		
Shortal, <i>Ex parte</i> ; <i>In re</i>		Y.	
Kilkenny Corporation,	570		
Smyth, Garland v.	35, 41	Yool v. Ewing,	434
Stewart v. O'Neill,	87		

TABLE OF CASES CITED.

A.	PAGE
Acton Local Board <i>v.</i> Batten, .	230
Ailesbury's Settled Estates, <i>In re</i> , ...	494
Aiton <i>v.</i> Brooks, ...	39
Allen <i>v.</i> Flood, ...	414, 418
— <i>v.</i> Richards, ...	322, 326
Anderson <i>v.</i> Anderson, ...	158, 160
Andrew <i>v.</i> Swansea Cambrian Benefit Building Society, ...	89
Andrews <i>v.</i> Emmott, ...	53
Archbold <i>v.</i> Charters, ...	8
Armstrong <i>v.</i> Eldridge, ...	542, 549
Arnold's Trusts, ...	39
Aslatt <i>v.</i> Corporation of South- ampton, ...	435
Association of Land Financiers, <i>In re</i> , ...	377
Attorney-General <i>v.</i> Birming- ham (Council and Borough of), ...	228
— <i>v.</i> Clerken- well Local Board, ...	231
— <i>v.</i> Colney Hatch Lunatic Asylum, ...	229
— <i>v.</i> Croker, ...	481
— <i>v.</i> Dorking (Guardians of the Poor of)	229
— <i>v.</i> Guildford Joint Hospital Board, ...	163, 194
— <i>v.</i> Hackney Local Board, ...	229
— <i>v.</i> Horner, ...	480
— <i>v.</i> Manchester (Corporation of), ...	163, 164, 193
— <i>v.</i> Merthyr Tydvil Union, ...	69
— <i>v.</i> Sheffield Gas Consumers' Co., ...	415
Austen <i>v.</i> Collins, ...	435

	PAGE
Austria (Emperor of) <i>v.</i> Day and Kossuth, ...	415
Averall <i>v.</i> Wade, ...	113, 116, 117, 118
Aylesford Peerage, The, ...	440

B.

Badger <i>v.</i> Gregory, ...	40
Bagot's Settlement, <i>In re</i> , ...	494
Bailey <i>v.</i> Barnes, ...	467, 470
Baker, <i>In re</i> , ...	393
Ball <i>v.</i> Graves, ...	354, 356, 357, 358, 359, 360
Banbury Peerage, The, ...	435
Bank of Ireland <i>v.</i> M'Carthy, ...	104
Bankes, <i>In re</i> , ...	330, 331
Baring, <i>In re</i> , ...	245
Barned's Banking Co., <i>In re</i> , ...	303, 309
Barnes <i>v.</i> Racster, ...	113, 115
Barratt, <i>Ex parte</i> , ...	303
Barrett <i>v.</i> Gomm, ...	314
Barton's Trusts, ...	75
Bateman's Estate, ...	498, 503, 504
Bates <i>v.</i> Johnson, ...	466, 469
Batteste <i>v.</i> Maunsell, ...	150, 154
Beall <i>v.</i> Smith, ...	150, 154
Beattie <i>v.</i> Corder, ...	393
Beck's Trusts, ...	38
Beckwith <i>v.</i> Beckwith, ...	40
Beddow <i>v.</i> Beddow, ...	435
Belchier <i>v.</i> Butler, ...	468
Bellamy <i>v.</i> Sabine, ...	465
Belmore <i>v.</i> Kent County Coun- cil, ...	252, 259
Bendelow <i>v.</i> Wortley Union (Guardians of), ...	164, 165, 193
Benn, <i>Re</i> , ...	39, 40, 41
Berens, <i>Re</i> , ...	435
Bernasconi <i>v.</i> Atkinson, ...	99

	PAGE
Betty, <i>In re</i> , ...	246
Bevan v. Mahon-Hagan, ...	32
Billing v. Welch, ...	70
Birch, <i>In re</i> , ...	150, 393
Birmingham Vinegar Brewery Co. v. Powell, ...	321
Biss, <i>In re</i> ; Biss v. Biss, ...	73
Blackpool Pier Co. v. Fylde Union, ...	22
Blackwood v. London Chartered Bank of Australia, ...	467, 470
Blake v. Gale, ...	393
Blantern, <i>In re</i> , ...	38
Blayney, <i>In re</i> , ...	99
Bosville v. Attorney-General, ...	435
Bouch v. Sproule, ...	75
Bovill v. Hitchcock, ...	415
Bowman, <i>In re</i> , ...	38, 39, 40
Bown, <i>In re</i> , ...	329, 331
Boyes, <i>In re</i> , ...	487
Boyle v. Foster, ...	22
Brandon v. Brandon, ...	75
Brentwood Brick Co., <i>In re</i> , ...	533, 536
Brown v. Dunstable Corpora- tion, ...	230
— v. Jarvis, ...	543
Brunskill, <i>Ex parte</i> , ...	303
Buckland v. Papillon, ...	289
Bunbury's Estate, <i>In re</i> , ...	72, 75
Burgess v. Robinson, ...	32
Burleton v. Humfrey, ...	31
Burn, <i>Ex parte</i> , ...	303
Burrell v. Egremont, ...	135, 136, 145, 146
Buswell's Estate, <i>In re</i> , ...	72
Byrne v. Hill, ...	566

C.

Callow v. Flynn, ...	356, 357, 358, 359, 360
Cama, <i>Ex parte</i> , ...	306
Campbell v. McGrain, ...	157, 160
Carritt v. Real and Personal Advance Co., ...	468
Cartwright, <i>In re</i> , ...	243
Cave v. Cave, ...	465
Chapple v. Rees, ...	113
Charlton v. Rendall, ...	362
Child v. Stenning, ...	224, 226, 236
Chissum v. Deves, ...	339
Christie v. Cooper, ...	318
Church v. Mundy, ...	157
Clarke v. Cookson, ...	433
College of Physicians, <i>In re</i> , ...	75
Commercial Bank of Australia v. Wilson, ...	303, 306, 309

	PAGE
Commissioners of Church Tem- poralities v. Harrington, ...	280
Connellan's Trust, <i>Re</i> , ...	38
Connolly v. Munster Bank, ...	465
Conway v. Fenton, ...	514
Cooke v. Cooke, ...	449
Coombes, <i>In re</i> , ...	330
Cooper v. Phibbs, ...	75
Copland's Settlement, ...	243
Coppen v. Moore, ...	317
Cork (Corporation of) v. Rooney, ...	435
Cory v. Eyre, ...	468
Courtier, <i>In re</i> , ...	245, 246
Cousins, <i>Re</i> , ...	286, 287, 289
Cowley, <i>In re</i> , ...	20
Cowley v. Cowley, ...	435
Currey, <i>In re</i> , ...	331
Curry v. Stanley, ...	292

D.

Dames Longworth's Estate, ...	237, 338
Daniel v. Daniel, ...	157
Daniell's Settled Estates, <i>In re</i> , ...	572
Dawson v. McGrogan, ...	481, 482
Dempsey v. Ward, ...	78
Dent v. Dent, ...	514
Derham v. Hamilton, ...	22
De Teissier's Settled Estates, ...	514
Dicks v. Brooks, ...	414
Dobson v. Waterman, ...	525
Doe d. Kenrick v. Beauclerk, ...	31
— d. Taylor v. Crisp, ...	31
— v. Sumner, ...	3
Dowse v. Gorton, ...	336
Draycott v. Wood, ...	549
Duckett v. Thompson, ...	362, 364, 365
Dunnill's Trusts, <i>In re</i> , ...	365

E.

Exhall Coal Co., <i>In re</i> , ...	335
Eyre v. Marsden, ...	38

F.

Farrand v. Yorkshire Banking Co., ...	466, 469
Fearon, <i>In re</i> , ...	330
Fenton v. Nevin, ...	488, 489
Ferguson v. Ferguson, ...	514
— v. Mahon, ...	72
Ferrand v. Hallas Land and Building Co., ...	225, 233
Ffrench's Estate, <i>In re</i> , ...	282, 461, 465, 466, 467, 469, 472

	PAGE		PAGE
Finch v. Shaw, . . .	113, 116	Harrison v. Kirk, . . .	393
Findlater v. Quirke, . . .	321, 324	—— v. Rutland (Duke of), . . .	252
Finnegan's Estate, . . .	75	Harrop v. Ossett (Corporation of), . . .	164, 187, 194
Fitzgerald v. Ryan, . . .	32	Hartley, <i>Ex parte</i> , . . .	109, 113, 115
Fitzgerald, <i>In re</i> , . . .	150, 154	Hartley v. O'Flaherty, . . .	346
Fitzgerald's Estate, . . .	498, 501	Hawker's Settled Estates, <i>In re</i> , . . .	514
Fleet v. Metropolitan Asylums Board, . . .	164, 176, 185, 193	Hawkins v. Hamerton, . . .	38
Fleetwood, <i>In re</i> , . . .	487	Haynes v. Forshaw, . . .	113, 117
Flint v. Howard, . . .	114	Hayward v. Hayward, . . .	415
Foley v. Roland, . . .	292	Hengler, <i>In re</i> , . . .	514
Fonnereau v. Poyntz, . . .	524	Heveningham v. Heveningham, . . .	345
Fraunces's Case, . . .	31	Higginson v. Barneby, . . .	363
Frith v. Cameron, . . .	514	Hill v. Brown, . . .	76, 85
Fry v. Porter, . . .	31	—— v. Hill, . . .	363
		—— v. Simpson, . . .	468
G.		Hiscocks v. Hiscocks, . . .	527, 528
Gaffney v. Fetherstonhaugh, . . .	550, 555, 556, 557, 558, 559, 560, 568	Hodgens, <i>In re</i> , . . .	75
Gardner v. Gardner, . . .	434, 446	Hogan's Estate, <i>In re</i> , . . .	570, 571, 572, 573
Garlick v. Lawson, . . .	445	Hole v. Escott, . . .	454
Gartside v. Silkstone and Dordworth Coal and Iron Co., . . .	89	Holland v. Allsopp, . . .	38, 39
Gaunt v. Taylor, . . .	336	Holmes, <i>In re</i> , . . .	330, 331
Geddis v. Temple, . . .	488	Holt v. Holt, . . .	75
Gibbs v. Lawrence, . . .	159	Hood v. Phillips, . . .	137
Gibson v. Doeg, . . .	481	Hotchkys, <i>In re</i> , . . .	514
Gifford v. Fitzhardinge, . . .	135	Household, <i>In re</i> , . . .	514
Giles, <i>In re</i> ; Real and Personal Advance Co. v. Michell, . . .	121	Hughes v. Turner, . . .	54
Gjers, <i>In re</i> , . . .	246	—— v. West, . . .	431
Glossop v. Heston and Isleworth Local Board, . . .	230	—— v. Williams, . . .	113, 116
Gloster v. Ryan, . . .	22	Humber v. Richards, . . .	468
Glover, <i>In re</i> , . . .	20	Hurst, <i>In re</i> , . . .	514
Godley's Estate, <i>In re</i> , . . .	146	Huxtable, <i>In re</i> , . . .	488
Goldsmid v. Tunbridge Wells Improvement Commission, . . .	228		
Goodlad v. Barnett, . . .	523	I.	
Gray v. Robinson, . . .	542, 543	Incorporated Society v. Richards, . . .	3
Grey's Settlements, <i>In re</i> , . . .	330, 331	Inderwick v. Tatchell, . . .	39
Grier v. Grier, . . .	363	Islington Vestry v. Hornsby U. D. C., . . .	69
Grier's Estate, <i>In re</i> , . . .	76		
Griffith, <i>In re</i> , . . .	336	J.	
Grimstone, <i>Ex parte</i> , . . .	150, 154	Jackson, <i>In re</i> , . . .	514
Grogan v. Regan, . . .	3	James v. Dean, . . .	75
Gurney v. Gurney, . . .	449	Jenkins v. Bushby, . . .	415
		Johnson, <i>In re</i> , . . .	335
H.		Jones v. Bone, . . .	207
Hales v. Cox, . . .	114, 117	Jones, <i>In re</i> , . . .	113, 117
Hallett v. Martin, . . .	572		
Hamilton v. Denny, . . .	346	K.	
—— v. Sharpe, . . .	8	Kearney v. Lloyd, . . .	414
Handcock v. Handcock, . . .	113	Keech v. Sandford, . . .	73
Harrison v. Harrison, . . .	39	Kelly v. Munster and Leinster Bank, . . .	466, 469

	PAGE
Kendall, <i>Ex parte</i> , . . .	107, 109, 115
Ker v. Ker, . . .	113, 118
Kevan v. Crawford, . . .	445
Kingham v. Kingham, . . .	242, 245
Kinson Pottery Co. v. Poole Corporation, . . .	230
Kirkheaton District Local Board v. Ainley, . . .	224, 225, 227, 234

L.

Lade v. Holford, . . .	457
Langdale (Lady) v. Briggs, . . .	444, 445
Lanoy v. Athol, . . .	105, 113
Layard v. Maud, . . .	466, 469
Leader's Estate, <i>In re</i> , . . .	498, 500, 501, 502, 503, 504, 505, 512
Leahy v. De Moleyns, . . .	389, 393, 394, 396, 397, 398
Leathem v. Craig, . . .	414, 418, 427
Lee v. Nuttall, . . .	377
Lefroy v. Walsh, . . .	481
Legh's Settled Estate, <i>In re</i> , . . .	514
Leinster Contract Corporation, <i>Re</i> , . . .	378, 387
Leng, <i>In re</i> ; Tarn v. Emmerson, . . .	377, 378, 383, 384, 386, 387
Lill v. Lill, . . .	541, 542, 543, 549
Lindgren v. Lindgren, . . .	523, 526
Lindsay v. Wicklow, . . .	146
Llandudno U. D. C. v. Woods, . . .	69
Lloyd's Estate, . . .	137
Loch v. Bagley, . . .	362, 365
London and Suburban Land and Building Co. v. Field, . . .	207
Lyons v. Wilkins, . . .	414
Lysaght v. Lysaght, . . .	146

M.

McCarthy v. Bennett, . . .	294
McConaghy v. Gledstones, . . .	22
McCormick v. Grogan, . . .	490
McDermott v. Wallace, . . .	541, 549
McMurdo, <i>In re</i> , . . .	393
McNaul's Estate, <i>In re</i> , . . .	70

Maconchy v. Bank of New Zealand, . . .	431
Madden v. Wilson, . . .	280
Maggi, <i>In re</i> , . . .	378, 379, 380, 381, 383, 386, 387
Malloon v. Fitzgerald, . . .	31
Manar, The, . . .	435
Mangan v. Metropolitan Electric Railway, . . .	415
Manson v. Cooper, . . .	313

Martin, <i>In re</i> ; Hunt v. Chambers, . . .	433
Martin v. Martin, . . .	7
Massey v. Barton, . . .	453, 454, 455, 456, 458
Meador v. West Cowes Local Board, . . .	231
Mersey Steel and Iron Co. v. Naylor, . . .	378
Metropolitan Board of Works v. L. & N. W. Railway, . . .	229
Michell v. Michell, . . .	157
Mill v. Hill, . . .	75
Miller, <i>Re</i> , . . .	157
Miller v. Travers, . . .	527, 528
Moffett v. Lord Gough, . . .	415
Mogul S.S. Co. v. McGregor, . . .	414, 418, 422, 423, 427
Montagu, <i>In re</i> , . . .	514
Moore v. Smith, . . .	377, 379, 383
Morgan, <i>Re</i> , . . .	54
Morison v. Morison, . . .	335, 338
Morris v. Davies, . . .	435
— v. Latchford, . . .	336
Moss v. Cooper, . . .	490
Mumford v. Stohwasser, . . .	468
Murphy v. Broder, . . .	31, 32, 33
Murray v. Scott, . . .	89

N.

Nash v. Allen, . . .	364
Neaverson v. Peterborough Rural District Council, . . .	480
Neld v. Hendon Urban District Council, . . .	252
Nelson v. Headfort, . . .	565
New, <i>In re</i> , . . .	514
Nicol v. Beaumont, . . .	253
Nicoll v. Fenning, . . .	207
Nolan, Landlord; Lee, Tenant, . . .	23
North Eastern Railway Co. v. Hastings, . . .	479, 480
Northey v. Paxton, . . .	157, 158, 160
Nowell v. Roake, . . .	54
Nunn's Trusts, . . .	99

O.

O'Brien v. Mitchelstown Loan Fund, . . .	95
— v. O'Brien, . . .	38, 39
O'Flaherty v. McDowell, . . .	79
O'Keefe v. Walsh, . . .	414, 418, 424, 427
Owen v. Williams, . . .	75
Owen's Estate, <i>In re</i> (No. 1), . . .	72, 79
—, — (No. 3), . . .	238

P.	PAGE
Parker v. Marchant, . . .	157, 158
Parry and Hopkin, <i>In re</i> Arbitration between, . . .	243
Pearce v. Edwardes, . . .	542
Pearks v. Moseley, . . .	459
Phillips v. Phillips, . . .	75
Phipps v. Ackers, . . .	33
Pickering v. Vowles, . . .	75
Pillgrem v. Pillgrem, . . .	464
Pilson v. Spratt, . . .	292
Plummer, <i>Re</i> , . . .	308
Pole v. Pole, . . .	73
Portarlington's Estate, <i>In re</i> , . . .	511
Porter's Settlement, <i>In re</i> , . . .	54
Poulett Peerage, <i>The</i> , . . .	441
Powell v. Rawle, . . .	32
Price v. Price, . . .	465
Priestley v. Holgate, . . .	32
Proctor v. Bishop of Bath and Wells, . . .	457
Pyle Works, <i>In re</i> , . . .	89

Q.

Queale's Estate, <i>In re</i> , . . .	465, 469
---------------------------------------	----------

R.

R. (Moore) v. Abbott, . . .	355
— (Lambe) v. Antrim (Justices of), . . .	208, 209
— (M'Kenney) v. Armagh (Justices of), . . .	208, 209
— (Collins) v. Donegal (Justices of), . . .	207, 209
— (Collins) v. Fermanagh (Justices of), . . .	252
— v. Hermann, . . .	7
— v. M'Evilly, . . .	320, 321
— v. Parnell, . . .	421
— (Marshall) v. Tyrone (Justices of), . . .	208, 210
— (Rothschild) v. United Kingdom Electric Telegraph Co., . . .	252, 254, 266
— v. Wright, . . .	266
Radnor's Trusts, <i>Re</i> , . . .	76
Rancliffe v. Parkins, . . .	113
Rahkin v. M'Murtry, . . .	3
Raymond, <i>Ex parte</i> , . . .	481
Redding, <i>In re</i> , . . .	242, 245
Rhodes v. Rhodes, . . .	542, 543
Rice v. Rice, . . .	282, 466, 469
Richardson v. Murphy, . . .	207
Ridgway v. Newstead, . . .	389, 393, 394, 396, 399
Riordan v. Banon, . . .	487, 488, 491
Roche's Estate, . . .	113, 117

Rochfort v. Fitzmaurice, . . .	365
Rose v. Loftus, . . .	315
Rownd v. Pickett, . . .	542
Royal Bank of Scotland, <i>Ex parte</i> , . . .	306
Royal General Theatrical Fund Association v. Kydd, . . .	488
Rushforth, <i>Ex parte</i> , . . .	303, 306

S.

Sackville-West v. Holmesdale, . . .	363, 364
Sanders v. Sanders, . . .	3
Sarel v. Sarel, . . .	543
Saunderson v. Stoney, . . .	280
Saxby v. Easterbrook, . . .	414
Scott v. Brownrigg, . . .	488
Scott's Estate, <i>In re</i> , . . .	113, 117, 118
Secretary of State for War v. Studdert, . . .	414, 415, 419, 424
Selwood v. Mildmay, . . .	523, 524, 525, 527, 528
Shaw's Trusts, <i>In re</i> , . . .	514
Shelfer v. City of London Electric Lighting Co., . . .	423
Sherwood v. Sanderson, . . .	150
Shinwick v. Beresford, . . .	292
Shrewsbury v. North Staffordshire Railway Co., . . .	75
Shropshire Union Railways and Canal Co. v. Reg., . . .	282, 461, 468
Singer v. Loog, . . .	321
Sloane's Estate, <i>In re</i> , . . .	461, 465, 466, 468, 469, 472
Small v. Smith, . . .	89
Smith v. English and Scottish Mercantile Investment Trust, . . .	89
— v. Morgan, . . .	378, 386, 387
— v. Osborne, . . .	38
Smyth v. Moore, . . .	294
Stackhouse v. Jersey, . . .	464
Stamford's Estate, <i>In re</i> , . . .	494
Starey v. Chilworth Gunpowder Co., . . .	320
Stead, <i>In re</i> , . . .	488
Stevens v. Pyle, . . .	542
Stogdon v. Lee, . . .	333
Stott v. Milne, . . .	336, 338
Swan v. Holmes, . . .	542
Swindell v. Birmingham Syndicate, . . .	415
Swinfen v. Swinfen (No. 4), . . .	157

T.

Tabor, <i>In re</i> , . . .	330
-----------------------------	-----

	PAGE
Taff Vale Railway Co. v. Amalgamated Society of Railway Servants, . . .	423, 427
Taylor v. Russell, . . .	466, 470
Temperton v. Russell, . . .	414, 418, 422
Tennent v. Neill . . .	481
Thomas v. Williams, . . .	414
Thorley's Cattle Food Co. v. Massam, . . .	414
Tippett's and Newbould's Contract, <i>In re</i> , . . .	331
Tomlinson, <i>In re</i> , . . .	245
Trumper v. Trumper, . . .	75
Tuckerman v. Jeffries, . . .	549
Turner v. Ringwood Highway Board, . . .	252, 253, 266
Turner, <i>Re</i> ; <i>Ex parte</i> West Riding Union Banking Co.,	303
Tyler v. Thomas, . . .	465

V.

Von Brockdorff v. Malcolm, 454, 459

W.

Waite v. Littlewood,	.	.	38
Walker's Estate,	.	.	38

	PAGE
Walter v. Parrott, . . .	361
Ward v. M'Roberts, . . .	292
Waring, <i>Ex parte</i> , . . .	306, 309
Warner v. Murdock, . . .	433
Warwicker v. Bretnall, . . .	78, 84
Watson v. Arundel, . . .	158, 160
Welch v. Knott, . . .	315
Welch, <i>Re</i> , . . .	76
Weldon v. Bradshaw, . . .	541
Wells v. Attenborough, . . .	207
Whitaker, <i>Re</i> , 378, . . .	380, 383, 384, 385, 386, 387
White's Estate, <i>In re</i> , . . .	72, 75
Wildman, <i>Ex parte</i> , . . .	306
Wilkinson v. Duncan, . . .	453, 454, 458, 459, 460
Williams v. James, . . .	38
——— v. Williams, . . .	378
Willis, <i>In re</i> , . . .	514
Wood v. Burgess, . . .	316
Wortley v. Birkhead, . . .	466, 469

Y.

Yem v. Edwards, ...	73, 78
Young v. Ashley Gardens Properties, Limited, ...	69
——— v. Macintosh, ...	362

C O R R I G E N D A .

Page 14, line 16, *transpose* "which" *from after* "but"
to after "purpose," line 17.

Page 307, line 2, *for* "changed" *read* "charged."

Madden, J. 1903. beneficially and absolutely vested in Patrick Hayden, and that he might be entered on the register as owner of such interest.

In re
HAYDEN.

The facts, which were fully stated in the case for the opinion of the Judge, as approved by the registrar of titles, were :—

By an indenture of lease, dated the 10th of July, 1817, and made between Henry Luttrell of the one part, and James Evans of the other part, Henry Luttrell demised unto James Evans a dwelling messuage and tenement in Cornmarket, in the city of Dublin, to hold for the term of 999 years, subject to the yearly rent of £45 10s. late currency (equivalent to £42 present currency), with a covenant by the lessee to make certain expenditure therein mentioned. The lessee entered into possession and duly made the expenditure. He subsequently died intestate, leaving two daughters, one of whom, Mary, married Peter Whittaker; the other died intestate. Letters of administration to the estate of James Evans were granted to Mary Whittaker. By an indenture of lease, dated the 29th of July, 1846, and made between Mary Whittaker (administratrix of James Evans) and Peter Whittaker of the one part, and Richard Candler of the other part, Mary Whittaker, with the consent and approbation of Peter Whittaker, demised the premises to Richard Candler for twenty-one years, at the rent of £50 sterling. On the 29th of May, 1855, Richard Candler assigned the premises to John M'Gauran for the residue of the term of the lease of the 29th of July, 1846. The tenant, John M'Gauran, continued on in occupation of the premises after the expiration of the lease of the 29th of July, 1846. By an indenture of assignment, dated the 17th of July, 1879, and made between John James M'Gauran and Kate M'Gauran, executor and executrix of John M'Gauran, of the first part, Michael Joseph M'Gauran of the second part, John Smith of the third part, and Patrick Hayden of the fourth part, reciting that John M'Gauran was in his lifetime possessed of and entitled to the premises as tenant from year to year, and reciting his death and the probate of his will to John James M'Gauran and Kate M'Gauran, and reciting that John Smith was tenant of the premises, John James M'Gauran, Kate M'Gauran, Michael Joseph M'Gauran, and John Smith assigned to Patrick Hayden all their interest in the premises, subject to the rent of £50.

It was stated that some time between the years 1855 and 1879 Mary Whittaker made default in payment of the £45 10s. (late currency), and that thereupon application was made by the representatives of Henry Luttrell to John M'Gauran for the rent, which he duly paid, and continued to pay in his lifetime, and that Patrick Hayden, after his death, continued such payments to the present, getting receipts in the name of the representatives of James Evans. It was also stated that when the demand for rent was made upon John M'Gauran by the representatives of Henry Luttrell, he caused inquiries to be made for Mrs. Whittaker, and he then ascertained that she had gone to New York, and had been out of the country for several years; and it was also stated, but not proved, that she had died in New York. John M'Gauran caused advertisements for Mrs. Whittaker to be published in Irish and American newspapers, but no trace of her could be found.

Madden, J.
1903.

In re
HAYDEN.

D. F. Browne, K.C., for the applicant:—

The applicant is entitled to be registered as owner of the lease of 1817. All claims by Mary Whittaker, and persons claiming through her, are barred by section 8 of the Statute of Limitations (3 & 4 Wm. 4, c. 27). The payment of the head-rent of £42 by M'Gauran and P. Hayden did not keep alive any claim to the premises by Mary Whittaker: *Grogan v. Regan* (1). If the rights of Mary Whittaker, and those claiming through her, are barred, the applicant is the assignee of the lease of 1817 by force of the statute: see 3 & 4 Wm. 4, c. 27, s. 34; *Doe v. Sumner* (2); *Incorporated Society v. Richards* (3); *Sanders v. Sanders* (4); *Ran-kin v. M'Murtry* (5); *Shelford's Real Property Statutes* (10th ed.), p. 179.

MADDEN, J.:—

I think this is a clear case. Mr. Browne has stated the law with accuracy. As the application is one for first registration, founded upon a statutory title, there must be advertisements, of which the registrar will settle the form. There might possibly be

(1) [1902] 2 I. R. 196, 201.

(2) 14 M. & W. 39.

(3) 1 Dr. & War. 258.

(4) 19 Ch. D. 373.

(5) 24 L. R. Ir. 290.

Madden, J. adverse claims made by persons entitled to the lessee's interest in the lease of 1817 other than the applicant. If none come forward
 1903. I shall declare the applicant entitled to be registered as the owner
In re of the lease of 1817 (1).
HAYDEN.

Solicitors for the applicant: *Thomas F. O'Connell & Son.*

W. C. S.

Land Com.

1902.

May 13.

June 2.

Appeal.

Nov. 4, 5.

MONTGOMERY, LANDLORD; FOY, TENANT (2).

Landlord and tenant—Land Law (Ireland) Act, 1881, sect. 5—Resumption of holding by landlord—Reasonable and sufficient purpose—Acquisition of summer run for purpose of introducing breed of Highland cattle.

The landlord sought to resume possession of a holding, consisting of 524 acres of mountain, for the purpose of extending and developing a herd of West Highland cattle, which he had introduced with a view to improving the cattle raised in the district:—

Held, by the Court of Appeal (Lord Ashbourne, C., and FitzGibbon and Holmes, L.JJ.; Walker, L.J., *dubitante*), that the purpose was reasonable and sufficient, having relation to the good of the holding or of the estate, within the meaning of section 5 of the Land Act of 1881, and that the landlord was entitled to resume.

APPEAL by way of rehearing from the order of the Sub-Commission, dated 27th February, 1902, giving the landlord liberty to resume for the purpose of breeding Highland cattle for the benefit of the tenants on the estate, the holding of the tenant containing 524A. and 30P., and fixing as the compensation for such resumption the sum of £30.

The landlord was owner of a considerable estate in the counties of Fermanagh and Tyrone, with a large number of tenants who

(1) NOTE.—In pursuance of the order, advertisements were duly issued, and no persons appeared or objected within the time limited, whereupon the Court ordered that “the registrar of titles should be at liberty to register Patrick Hayden as full owner of the premises, the subject of the application, for the unexpired residue of the term of 999 years, from the 10th day of July, 1817, created by an indenture of lease, made the 10th day of July, 1817, by Henry Luttrell to James Evans.”—W. C. S.

(2) Before MEREDITH, J., and the Hon. Mr. Commissioner FITZGERALD, K.C.

had mountain land attached to their holdings. The cattle in the district were of a poor class and not suited to mountainous land. The landlord, with a view to benefit the estate and district, had tried Kerry and other breeds, but they did not thrive in the district, which was cold and wet. In the year 1896, with the same view, he first began to keep a herd of Highland cattle. They thrived well, but he had not enough mountain land in hands to serve for a summer run to keep up a herd of sufficient size to enable him to sell the surplus heifers at a reasonable price to his tenants, so as to induce them to rear cattle suited to the district. The landlord desired to extend and develop the herd, and the holding sought to be resumed was convenient in every way for the purpose. It was proved that the Highland cattle reared on the mountains, and brought down to lowland grazing, fattened very quickly, and commanded a high price. It was also proved that a cross between the Highland and shorthorn breeds was well suited to, and thrived in the district. It was admitted that as yet none of the tenants had purchased any of the Highland cattle, and that the attempted introduction of the breed was at the date of the application only in an experimental stage.

Land Com.
1902.

MONTGOMERY
Landlord;
FOY,
Tenant.

The holding which it was proposed to resume contained 535A. 20p., was entirely heather, and had no building of any kind upon it. It was situated above and immediately adjoining a farm of 240 acres in the landlord's hands, on which there was a herd's house and byre, and on which the landlord kept the herd in winter. The tenant first acquired the holding in the year 1877, and had paid no fine or input for it, and had effected no improvement. His first fair rent was fixed in the year 1883, and the second in 1901, at £4 7s. 6d.; the poor law valuation was £8 10s. The tenant had also three other holdings in the neighbourhood from the same landlord. He used the holding in question for grazing a middling class of shorthorns. He had erected accommodation on a neighbouring holding for the cattle, which he grazed on the holding now sought to be resumed; and he lived on a holding which he held from an adjoining landlord, from whom he had a lot of mountain grazing.

Wakely, K.C., for the landlord.

Land Com.
1902.

Drummond, K.C., and P. Law Smith, for the tenant.

MONTGOMERY
Landlord;

Fox,
Tenant.

June 2.

MEREDITH, J. :—

In my opinion, experimental farming is not “a reasonable and sufficient purpose, having relation to the good of the holding or estate,” within the meaning of the resumption clause contained in section 5 of the Land Act of 1881. I base my judgment upon the construction of the clause as a whole. “During the continuance of a statutory term in a tenancy,” says the Act, “save as hereinafter provided, the Court may, on the application of the landlord, and upon being satisfied that he is desirous of resuming the holding, or part thereof, for some reasonable and sufficient purpose, having relation to the good of the holding or of the estate, including the use of the ground as building ground, or for the benefit of the labourers in respect of cottages, gardens, or allotments, or for the purpose of making grants or leases of sites for churches or other places of religious worship, schools, dispensaries, or clergymen’s or schoolmasters’ residences, authorise the resumption thereof by the landlord upon such conditions as the Court may think fit, and require the tenant to sell his tenancy in the whole or such part to the landlord upon such terms as may be approved by the Court, including full compensation to the tenant.” I read the words, “including the use of the ground as building ground,” &c., as indicating the class of reasonable and sufficient purpose intended (in the strict technical sense of the word) by the Legislature, and thus restricting and limiting the wide jurisdiction which would have been conferred upon the Court had the clause stopped at the words “good of the holding or of the estate.”

I do not hold, nor do I think it could be held, that the particular instances specified exhaust the purposes for which resumption may be authorised. That would be to give the word “including” a strained interpretation. Nor, on the other hand, do I think it possible to attribute to the word in question an extending or amplifying meaning: to read it as if bringing within the class indicated in the general words, “purposes” which would otherwise be excluded. It seems to me that one can hardly doubt that each and all of the purposes specified would ordinarily and naturally

fall within the general words. I think the true object of the specific enumeration was to interpret by illustration and example the meaning and intention of the Legislature, and thus (without restricting the jurisdiction of the Court to the specified cases) to explain and qualify the general words. If I am right in this view it seems to follow that "a reasonable and sufficient purpose," within the meaning of the section, must be of a definite permanent character, not temporary or experimental. However good the motive (and no one suggests that Mr. Montgomery is not actuated by the best motives), if the purpose be one which may or may not result in improvement or benefit to the holding or estate, it seems to me outside the statute. An experiment in cattle-breeding which may or may not prove a success, obviously may or may not prove beneficial to the estate. It may turn out a failure; the experiment may be abandoned in a few short years. In my view such a purpose, however *bona fide*, however well-intentioned, is not within the scope or meaning of the 5th section. My colleague, Mr. Commissioner Fitz Gerald, who is sitting in Merrion-street to-day, requests me to state that he leans to the opinion that the "purpose" for which the landlord in the present case seeks to resume the holding is one which upon the entire evidence has a reasonable 'prospect' of success, and as such comes within the resumption clause of the 5th section. He has read my judgment, and, having regard to the views expressed by me, he does not press his opinion to a formal dissent.

The order of the Court will therefore be: reverse the order of the Sub-Commission, and dismiss the originating notice with costs.

W. C. S.

Land Com.
1902.

MONTGOMERY
Landlord;
Fox,
Tenant.

Meredith, J.

The landlord, by leave of the Land Commission, appealed to the Court of Appeal (Lord Ashbourne, C., Fitz Gibbon, Walker, and Holmes, L.JJ).

Appeal.
Nov. 4, 5.

Jellett, K.C., Wakely, K.C., with them *C. Atkinson*, for the appellant, cited *Martin v. Martin* (1) and *The Queen v. Hermann* (2).

(1) [1898] 1 I. R. 120.

(2) 14 Q. B. D. 284.

Appeal. *Drummond, K.C., and Healy, K.C. (with them P. Law Smith),*
 1902. cited *Archbold v. Charters* (1) and *Hamilton v. Sharpe* (2).

MONTGOMERY

Landlord ;

For,
Tenant.

Nov. 5.

LORD ASHBOURNE, C. :—

This is an appeal from an order of the Irish Land Commission made in a case which involves a point of some interest. The landlord served an originating notice, during the continuance of the second statutory term, seeking to resume possession of the holding under the provisions of section 5 of the Land Law (Ireland) Act, 1881. The material portion of that section is as follows:—
 “During the continuance of a statutory term in a tenancy, the Court may, on the application of the landlord, and upon being satisfied that he is desirous of resuming the holding or a part thereof for some reasonable and sufficient purpose having relation to the good of the holding or of the estate, authorise the resumption thereof by the landlord, upon such conditions as the Court may think fit, and require the tenant to sell his tenancy to the landlord, upon such terms as may be approved by the Court, including full compensation to the tenant.”

It appears that the holding of which the landlord seeks to resume possession under this section is a large tract of mountain land, the fair rent of which is, as nearly as possible, twopence an acre. The landlord desires to resume possession of this tract for the purpose of forming a run for a herd of West Highland cattle, already introduced by him, suggesting that the introduction of this fine breed of cattle in the mountainous district of Fermanagh, where his property lies, and where he hopes to make them thrive better than other breeds do, will be for the benefit of the tenants and of himself, and that thus the purpose he has in contemplation is, in the words of the section, a “reasonable and sufficient purpose having relation to the good of the estate.”

When the application came before the Sub-Commission, the lay Assistant Commissioners inspected the holding, and after conference with them, Mr. Sheil, who presided, speaking for himself and his colleagues, pronounced a well-considered judgment in favour of the landlord, stating that, in their opinion, the holding

was convenient and very suitable for the purposes in view, that the proposed scheme had at least a reasonable chance of success, and if successful would be of undoubted benefit. The learned Assistant Commissioner adds :—" I hold that the mere experiment, apart altogether from its ultimate success or failure, is in itself a public or *quasi*-public good : and to prevent the experiment being made under suitable conditions at the outset would be little short of a public disaster." It is plain from this judgment that the experts before whom the matter first came regarded the application as beyond all question *bona fide*, and treated the project as one attended with considerable chances of success.

Appeal.
1902.
MONTGOMERY
Landlord ;
For,
Tenant.
Lord
Ashbourne, C.

The case was brought on appeal to the Land Commission, and came before Mr. Justice Meredith and Mr. Commissioner Fitzgerald. The judgment of Meredith, J., does not seek to encounter a single suggestion made by Mr. Sheil as to the *bona fides* of the application, or as to the scheme of the landlord being a move in the right direction. The first sentence of this judgment clearly puts the reason why the learned Judge deemed it necessary to reverse the decision of the Sub-Commission. " In my opinion," he says, " experimental farming is not a ' reasonable and sufficient purpose having relation to the good of the holding or of the estate ' within the meaning of the resumption clause contained in section 5 of the Land Law Act of 1881." He is led to this conclusion by the narrow interpretation which he felt constrained to put on the clause. Because, in his view, the general words describing the purposes for which resumption may be authorised are to be explained and controlled by the specific purposes enumerated later on, and introduced by the word " including." That is a very narrow and perilous way of interpreting an Act of Parliament, and I cannot see that we are bound to give any such restricted operation to the general words used in the resumption clause. If everything that has not been tried before in a locality is to be condemned as an experiment, the locality may be deprived of the teaching of civilisation, and the advantage of the experience of other districts. Where the purpose in contemplation is to make a *bona fide* experiment which has a fair chance of success, with a view to encourage a wise reform or improvement in the mode of farming amongst the tenants on

Appeal. an estate, it appears to me to be within the meaning of the
 1902. Act a "reasonable and sufficient purpose having relation to the
 MONTGOMERY good of the holding or of the estate."

Landlord: Mr. Commissioner FitzGerald, though he did not press his
For, opinion to a formal dissent from the judgment of Meredith, J.,
Tenant. was inclined to the view that the purpose for which the land-
 Lord seeks to resume the holding is one which upon the entire
 evidence had a reasonable prospect of success, and as such
 came within the resumption clause of section 5. Mr. Com-
 missioner FitzGerald's judgment, had it been pressed, would
 have agreed with the decision of the Sub-Commission.

Lord I am of opinion that that decision was right, and this
Ashbourne, C. appeal must be allowed.

FITZ GIBBON, L.J. :—

This case must turn upon a question of fact, and we should bear in mind that the expert tribunal before which the case first came, which inspected the holding and had special qualifications for deciding the question of fact, found for the landlord. It was only upon the construction of the Act of Parliament that Meredith, J., arrived at the opposite conclusion, and Mr. Commissioner FitzGerald, though he did not press his opinion so far as to require the case to be re-argued before the Land Commission, was inclined to think that, on the question of fact, the landlord had made out his case.

Two preliminary points were made by Mr. Healy. First, he argued that no appeal lay from the order of the Land Commission, as it was made upon a matter within their discretion. This point is without foundation, as leave to appeal to this Court was given by the Land Commission.

Secondly, he contended that the landlord's application was to resume the holding as a "home farm," which the holding, if resumed, could not be in the sense in which those two words are used in section 21. No doubt they occur in the originating notice, but it goes on to quote section 5, thereby making it quite clear that the application was brought under that section, and not under section 21, and "home farm," therefore, plainly means "farm to be worked by the landlord," and not merely "home

farm" in the sense—whatever that may be—in which that term is used in section 21.

There remains the main question, viz. Has the landlord shown that he is desirous of resuming the holding "for some reasonable and sufficient purpose having relation to the good of the holding or of the estate"?

It is impossible to conceive a case in which the power of resumption could be exercised with less disturbance of any valuable vested interest of the tenant. The fair rent of the holding was fixed at twopence per acre. The holding is a mountain tract, mostly growing heather with a few patches of green; with a total carrying power of only twenty "sums," and even that only during the summer months. There is not a dwelling, nor a building of any kind, on the entire 524 acres of what Mr. Sheil, in his graphic and persuasive judgment, calls "wild mountain." What is the good of talking about "turning out people for cattle" on such a place as that? The object of the landlord is to make it useful for more and better cattle than it carries now. No human being lives on it, or ever can live on it, and it is pleasant to have to deal with a case in which no question of disturbance of the population can arise. The only two people interested in this holding are the landlord and the tenant; the landlord's present interest in respect of it is to receive a rent of twopence per acre, and the only interest of the tenant is the right to use it, subject to that rent, for the summer grazing of what he himself has called "a lot of very middling cattle." All these elements must come into account in guiding the discretion of the Court as to whether the application should be granted or not. The grounds on which the Sub-Commission granted it have been so well put by Mr. Sheil that I shall read his judgment, and adopt it as my own.

Having quoted the section of the Act of Parliament, and referred to the reported cases decided upon it, he says:—

"Mr. Montgomery's scheme is definite. He has already started a herd of West Highland cattle, and has been endeavouring to make it a success for some years past; but he tells us in his evidence that he has been hampered and hindered by want of space, want of a large enough run for the cattle; and he tells us further, that he believes, if he can take in this present holding, that difficulty will disappear. I should think

Appeal.
1902.

MONTGOMERY
Landlord;
FOX,
Tenant.

Fitz Gibbon,
L.J.

Appeal.
1902.

MONTGOMERY
Landlord;
Fox,
Tenant.

Fitz Gibbon,
L.J.

there can be little doubt this mountain breed, imported from the Highlands of Scotland, cannot be expected to attain perfection in a restricted and confined area. The present holding consists of upwards of 500 acres of a wild mountain, on the borders of the county Fermanagh; it has been inspected by my lay colleagues, and, in their opinion, it is convenient and very suitable for the purpose in view. Again, I am of opinion Mr. Montgomery's scheme is a public or *quasi*-public benefit, and not merely for the benefit of his own pocket."

I may say for myself that if this experiment was not, at least in part, for the benefit of the landlord's pocket, I would not believe in it, nor expect it to succeed. Amateur experiments, or efforts of mere benevolence, or of so-called "public spirit," without hope of profit, are often only the airing of personal fads, and they lack the *stimulus* of pecuniary interest, which is the best earnest of success or permanency, and of ultimate advantage to anyone. Mr. Sheil proceeds:—

"No doubt, the tenant swore that neither he nor any of his neighbours would have anything to do with this breed of cattle; but I do not attach very much importance to that statement. It is the natural attitude towards the thing unknown, and would quickly disappear if the breed can be established and proves a success. The West Highland breed is very well known in Scotland and also in England, though possibly not so well known in Ireland. One has only to glance at the English papers about Christmas time to see the first prizes at cattle shows, and, what is more to the point, perhaps, the very high prices at markets, that these cattle bring; and if Mr. Montgomery can succeed in making this hardy breed flourish and thrive on the cold, wet mountains of Fermanagh, where we are frequently told in this Court no cattle can live in winter, I consider he will have proved himself as great a benefactor to the estate and the surrounding districts as the historic personage who made two blades of grass grow where one only had grown before. I do not think we are in any way bound to form a definite opinion whether the scheme will or will not ultimately prove a success. There is a *bona fide* intention on the part of Mr. Montgomery of trying the experiment at his own expense, and of risking his own money in it. We are satisfied that it is an experiment which has, at least, a reasonable chance of success, and which, if successful, will be of undoubted benefit. It is just the sort of thing the Agricultural Board, the Congested Districts Board, and other Bodies are doing nowadays with public money. Almost every modern improvement that has come to stay has had to pass through the trial or experimental stage. I may

instance the system of separating milk, creameries, the introduction of the Polled-Angus cattle, even of the very Shorthorn itself. I hold that the mere experiment, apart altogether from its ultimate success or failure, is in itself a public or *quasi*-public good, and to prevent the experiment being made under suitable conditions at the outset would be little short of a public disaster."

Appeal.
1902.

MONTGOMERY
Landlord ;
FOX,
Tenant.

Fitz Gibbon,
L.J.

Adopting the language of the learned Assistant Commissioner, I do not think it would be exaggeration to say that the application to section 5 of the principle of construction which Meredith, J., adopted would be a "public disaster." For this section, so far as I know, is the only means of escape from the clog on improvement, and the obstruction to progress, which might otherwise result from making fixity of tenure in all cases perpetual and absolute. It is the only section in the Land Law Acts which gives an opportunity to the owner of an estate, in a Lands Clauses Consolidation Act sort of way—*i.e.* on the terms of buying out the tenant on fair terms—to carry out a reasonable and sufficient purpose for the good of the holding or of the estate.

The section expressly contemplates a purpose having relation to the good of *the holding only* as being within the power of resumption. I therefore cannot accept the contention that the improvement of the holding itself might not be enough to justify resumption. But we have not to consider that question now. In this case the question is whether the extension of a system of breeding West Highland cattle in Fermanagh, which is already existing, but which cannot be developed without getting more room, is a reasonable and sufficient purpose having relation to the good of the applicant's estate, so as to justify an order enabling him to resume possession of a mountain tract of almost unproductive land. He has satisfied the experts before whom the case first came; he has satisfied Mr. Commissioner Fitz Gerald, on the appeal from them; and he has satisfied me now, that his purpose is reasonable, sufficient, and sincere; that it has a reasonable prospect of success; and that it has relation to the good not only of his own estate but also of all similar estates in Ireland, and of all tenants as well as landlords who are interested in the profitable breeding and rearing and sale of mountain cattle; we ought to be very slow to decide that the construction of the Act compels us to refuse it.

Appeal.
1902.
MONTGOMERY
Landlord;
Foy,
Tenant.
Fitz Gibbon,
L.J.

Mr. Justice Meredith's judgment leaves no doubt as to the principle of construction on which he went. He interpreted the resumption clause in section 5, by applying to the words of that clause what is known as "the *ejusdem generis* rule." But, with all respect, he seems to me to have inverted the rule. Where it applies, it narrows general words to the same *genus* to which specific words *which precede them* belong. Here the general words *come first*, and are followed by specific words of *inclusion*. If I may venture to use the technical terms of Logic, I hold that is a philosophical paradox to narrow the "extension" of a term by including something in it which might otherwise be left out. The specific words here take effect by preventing the exclusion of any of the particular purposes which are specified: some of these might or might not otherwise have been held not to be reasonable or sufficient purposes, having relation to the good either of the holding or of the estate, but which specifying them cannot exclude any purpose from the preceding general words they are otherwise sufficient to include.

For these reasons, and because I agree with the Sub-Commission and with Mr. Commissioner Fitz Gerald on the question of fact, I hold that the appeal must be allowed.

WALKER, L.J.:—

I entertain the gravest doubts whether the decision which the Court is about to pronounce is justified by the Act of Parliament, and I do not formally dissent only because my dissent would be useless in influencing the result.

I think the question is one of fact, not of law, but I feel bound to say that I think that all that Mr. Justice Meredith meant by referring to the special purposes he mentions was this, that the objects enumerated were all of a permanent character, as all those mentioned in preceding statutes also were, and, therefore, an argument was furnished that purposes which were merely experimental were not contemplated by the section—being neither reasonable nor sufficient.

In the present case the landlord has on his own hands some 240 acres, and he now desires to acquire from Foy some 524 acres of a mountain which he thinks will, with the 240 acres, afford the

opportunity of trying, for his own profit, an experiment in the keeping of West Highland cattle, and he also says that he thinks his tenants may be benefited by breeding such cattle, and he hopes to overcome the prejudices of the farmers in the district against these cattle, which are not useful for milking purposes, and that ultimately they may share in the advantages he hopes for by the introduction of this breed. If this case succeeds he could, with equal force, if he were owner of a mountain range of 524 acres, ask to resume a farm of 200 acres arable, which would supply a winterage for the cattle on his hill.

Foy has this 524 acres of hill, and he, at all events, will have no run for such cattle if he is deprived of the hill. Therefore, there can be no purpose existing for the good of the holding, and it also appears that there are only thirteen or fourteen tenants, having from 20 to 70 acres of mountain land attached to these farms, who could be expected to use such cattle, and all that Mr. Montgomery can say is, that they might buy a calf or two, or send one of their heifers to his Highland bull, and it is admitted by his witness that crosses are not likely to do well. They cannot, therefore, ever have a herd of those cattle.

Up to the present Mr. Montgomery has never had more than a little over a score of those cattle, and he has found the experiment not very successful, owing, as he says, to want of a bigger run, and accordingly he wants to take up this 524 acres; whether it will succeed or not, even for his own interest, is only guess work, and he knows the experiment will, in the first instance, at all events, be distasteful to the small farmers; but he wishes to take up the mountain on the chance of its proving beneficial. He does not pledge himself to go on unless it pays. He says, "Of course I am not prepared to say now whether I shall go on with the experiment at all if I could not carry it on satisfactorily." I cannot see the purpose having relation to "the good of the estate." Can Foy get back the farm if Mr. Montgomery finds the project not a paying one? I apprehend clearly not, and can it be said that this leap in the dark is a purpose sufficient to justify the Court in interfering with the fixity of tenure already conferred? I cannot think that it is, and in my opinion the precedent will be a dangerous one.

Appeal.
1902.

MONTGOMERY
Landlord;
FOY,
Tenant.

Walker, L.J.

Appeal.
1902.

HOLMES, L.J. :—

MONTGOMERY
Landlord ;
FOY,
Tenant.

We have here an estate consisting to a large extent of mountain grazing ; and there is abundant evidence to show that the cattle now using it are not only of poor quality, but of a breed unsuited to this kind of pasture. It is also proved that if there could be substituted for the present stock, cattle of the West Highland breed, the change would be profitable, and in every way advantageous to the property. In this state of things the landlord, a few years ago, imported animals from Oban, and placed them on a part of the mountain that is in his own hands, with the object of establishing on the property a herd of Highland cattle. He has added to their numbers from time to time ; and hitherto they have done well ; but it appears, to make the experiment completely successful, a larger range of the mountains is required than what is at present available ; and accordingly the landlord has applied to the Land Commission for an order under the 5th section of the Act of 1881, enabling him to resume possession of a holding consisting entirely of mountain pasture, adjoining the land in his own hands. There is, so far as I can see, no serious controversy as to facts. The several matters I have mentioned are proved by uncontradicted evidence, confirmed by the view taken by the lay members of the Sub-Commission, who paid two visits to the premises, and had an opportunity of forming a judgment after inspecting the lands and the cattle.

In the face of these facts, no one, I think, could seriously contend that it would not be for the good of the estate to establish on it a herd of Highland cattle ; and as the resumption of the holding is necessary to carry out this purpose, the case seems to be brought within the terms of the section. Whether, or to what extent, the purpose, when carried out, will benefit the tenants and occupiers of the lands, depends upon circumstances which no one can foresee with certainty. Many projects set on foot in this country for the improvement of agriculture have failed, not because they were not reasonable and sufficient in themselves, but by reason of the existence of a strong prejudice against novel methods.

It is not to be assumed that a landlord is entitled as of right

to a resumption order upon satisfying the Court that he is desirous of getting possession for some reasonable and sufficient purpose having relation to the good of the holding or of the estate. The Court ought to exercise its discretion, having regard to all the circumstances. What is lawful is not always expedient, and the good of an estate may be purchased at too high a price. A Court would not oblige a tenant to sell his holding, if to do so would cause him injury or hardship out of proportion to the good to be gained thereby. No such case, however, has been, nor do I think could be, made on behalf of the respondent. The holding is without a house, or any kind of improvement, and is let at two-pence an acre. It produces only the poorest pasture; and is of little value to the tenant, who has other and better holdings.

I gather that Mr. Justice Meredith would have agreed with the Sub-Commission, were it not that he was of opinion that the case did not come within the terms of the section. His reason, as I understand it, is, that the purpose for which the landlord requires the land is experimental, and may be abandoned at any time, if it is found to be inconvenient or unprofitable to proceed with it. He illustrates this proposition by reference to the purposes specified in the section; and he argues that any purpose other than these must be of a similar kind. This seems to me to limit the provision in a way which the language of the Legislature does not justify. The description of the purpose is in the first part of the sentence general; and when it is declared that this general purpose is to include certain specified matters, the object and effect are not to restrict, but to extend. Lord Justice Walker seems to think that where the landlord is principally influenced by a desire to promote his own interests, the case would not come within the section. I am unable to concur in this view, which would confine the purpose to projects purely philanthropic and altruistic. What is for the good of the estate must be also for the good of the landlord, who has still a considerable interest therein. I think Mr. Montgomery would not have set this project on foot merely for his own sake. On the other hand, I am sure he expects to be benefited by it. But even if the latter were his only motive, it would, in my opinion, make no difference. The first of the purposes specially mentioned is the use of the land as building

Appeal.
1902.

MONTGOMERY
Landlord;
Fox,
Tenant.

Holmes, L.J.

Appeal. ground, the advantages accruing from which would belong almost
 1902. entirely to the landlord.

MONTGOMERY For these reasons I am of opinion that the appeal ought to be
Landlord; allowed.
For,
Tenant.

Solicitors for the landlord: *Alexander Irvine & Co.*

Solicitor for the tenant: *Wray.*

G. Y. D.

M. R.

IN RE BRADSHAW.

1903.

Nov. 30. *Practice—Infant—Management of land during minority—Appointment of trustees—Infant absolutely entitled by will—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 42, sub-s. 1.*

Section 42, sub-section 1, of the Conveyancing and Law of Property Act, 1881, enabling the Court to appoint trustees on the application of a guardian or next friend of an infant beneficially entitled to the possession of any land, applies to the case of an infant taking absolutely by will.

SUMMONS.

This was an application on behalf of Adelaide Dorothea Copeland Bradshaw, and Adelaide Maud Robb, infants, by Thomas Picton R. Bradshaw and John Robb, their next friends, respectively, and the executors appointed by the will of Adelaide Tickell, that they be appointed trustees for the purpose of sect. 42 of the Conveyancing and Law of Property Act, 1881, of and concerning the property described in the title, bequeathed by Adelaide Tickell to the said Adelaide Dorothea Copeland Bradshaw, and Adelaide Maud Robb, respectively.

The summons was entitled in the matter of certain hereditaments and premises situate at Warrenpoint, part of the lands of Clontarf, in the county borough of Dublin, and certain premises known as Borcette, situate in the town of Bray, in the county of Wicklow, devised and bequeathed to Adelaide Dorothea Copeland Bradshaw by the will of Adelaide Tickell, deceased, and in the

matter of certain premises known as Nos. 3, 4, and 5, Belview-terrace, situate at Dollymount, in the county borough of Dublin, devised and bequeathed by the said will to Adelaide Maud Robb, and in the matter of the Conveyancing and Law of Property Act, 1881.

M. R.
1903.
In re
BRADSHAW.

The testatrix by her will, dated Feb. 23, 1903, bequeathed to her granddaughter, the said Adelaide Dorothea Copeland Bradshaw, the premises, other than those at Dollymount, to hold unto and to the use of the said Adelaide Dorothea Copeland Bradshaw, her heirs, executors, administrators, and assigns, according to the nature of the respective estates in the said premises, for the entire interest of the testatrix therein. These premises were leasehold, those known as Borcette being held indemnified against rent. The premises at Dollymount were also leasehold, and bequeathed in the same terms to her said granddaughter, Adelaide Maud Robb. The testatrix appointed the applicants her executors. The will contained bequests of other leasehold property to several persons, and amongst others to her son's children on attaining twenty-one, and empowered her executors at any time, prior to the absolute vesting of any of the property devised or bequeathed, to sell the same as therein mentioned, and during the said period to make lettings of all or any portion of the said property as therein mentioned.

The testatrix died on June 30th, 1903, and the will was duly proved by the applicants on September 16th, 1903. The applicants' affidavit stated that the said infants were aged eight and three years respectively, that the testatrix did not appoint trustees of her will, and that there was no person who had power to manage or deal with the properties of the said infants during their minority, and that they were desirous of being appointed trustees for the purposes of section 42 of the Conveyancing and Law of Property Act, 1881, so as to enable them to manage the said property during the minority of the said infants.

Jellett, K.C., for the applicants :—

The management clause in the will does not apply, as the infants took vested interests, and there are no trustees appointed by the will within the meaning of section 42. This section is not

M. R. confined to settled land, but includes the case of an infant being
 1903. absolutely entitled under a will. This Court, in *In re Glover* (1),
In re held that the section included the case of an infant taking by
 BRADSHAW. descent. That case was followed in England, in *In re Cowley* (2).
 This case comes within the principle of *In re Glover* (1), viz. that
 the section applies to land not in settlement, that is, where an
 infant is absolutely entitled.

THE MASTER OF THE ROLLS made an order in the terms of
 the summons.

Solicitors for the applicants : *Redington & Sainsbury.*

W. L.

Appeal.
 1902.
 Nov. 7, 20.

COLONEL J. P. NOLAN, LANDLORD; LEE, TENANT (3).
 BERRIDGE, LANDLORD; FOLAN, TENANT.

Landlord and tenant—Land Law (Ireland) Acts, 1881–1896—Fair rent—
“Circumstances of the case, holding, and district”—Facilities for obtain-
ing seaweed for the manufacture of kelp.

Where an agricultural holding is situated in a district in which the pro-
 duction of kelp is a recognised industry and a source of profit, the facility
 enjoyed by the tenant, by virtue of his tenancy, for taking suitable seaweed
 from the seashore for the manufacture of kelp is to be taken into consideration
 in fixing the fair rent of the holding.

Decision of the Irish Land Commission affirmed.

APPEALS from the judgments of the Irish Land Commission in
 several cases, dated May 3, 1902 (4), whereby the decision of the
 Sub-Commission was affirmed, in taking into account “the right
 of seaweed for kelp” as an item on which rent should be fixed.

All the cases depended on similar facts, and were heard
 together.

(1) [1899] 1 I. R. 337.

(2) [1901] 1 Ch. 38.

(3) Before LORD ASHBOURNE, C., and FITZ GIBBON, WALKER, and HOLMES,
 L.JJ.

(4) 36 I. L. T. R. 115.

The holdings were situated in a district which was a seat of the kelp-making industry, and at the hearing before the Sub-Commission and the rehearing before the Irish Land Commission the landlords alleged that the tenants derived considerable profit by converting the seaweed, which grows abundantly on the rocky foreshore of the estates, into kelp, and claimed that in estimating the fair rent a specific allowance should be made in respect of the facilities which the holdings afforded for the manufacture of this product. On the part of the tenants it was argued that the rents fixed must be confined to the agricultural or pastoral qualities of the holdings; that any advantages arising from their marine situation should be ignored in fixing the rent, as the profits of the kelp industry were due entirely to the toil and industry of the tenants themselves.

The evidence produced on behalf of the landlords showed that the rocks of the foreshore had been stripped in 1853, and apportioned amongst the tenants, each of whom was entitled, irrespective of the actual situation of his holding, to cut weed on a portion of the foreshore. It was admitted by certain of the tenants who dwelt too far from the shore to use this right with advantage, that they had been in the habit of selling or otherwise bartering their right to take weed to other tenants more favourably situated. The landlords contended that the kinds of weed suitable for the production of kelp grow on the foreshore; but this was disputed by the tenants, who averred that the most valuable kinds of weed for kelp grow far out in the deep ocean, and are gathered by their industry in boats at a distance of many miles from low water-mark. The Sub-Commission were of opinion that the questions, whether the weed grows upon the shore, or is cast upon it, or is gathered as drift weed in its immediate proximity, were immaterial; and, being satisfied in point of fact that the situation of the holdings afforded facilities for procuring weeds suitable for kelp, fixed the fair rent of the holdings, taking into account, as an item on which rent was fixed, the right of seaweed for kelp, the landlords admitting that the tenants were to have the right to take seaweed growing upon or coming on the shore for the use of the holdings and the manufacture of kelp during the continuance of the statutory term. The Assistant-Commissioners specifically

Appeal.
1902.

NOLAN,
Landlord;
LEE,
Tenant.

BERRIDGE,
Landlord;
FOLAN,
Tenant.

Appeal.
1902.

NOLAN,
Landlord;
LEE,
Tenant.

BERRIDGE,
Landlord;
FOLAN,
Tenant.

stated in the Pink Schedule that, "in estimating the amount stated in paragraph 5, the value of seaweed on the seashore and the immediate vicinity thereof, not merely for manure, but also for the making of kelp on the holding, has been taken into consideration."

On the rehearing before the Land Commission, the landlords expressly disclaimed any benefit or advantage in respect of seaweed taken from the deep sea, but alleged that a considerable quantity of weeds suitable for the production of kelp was obtainable, as growing weed or drift weed, upon or in the immediate vicinity of the foreshore. The tenants' witnesses disputed this, but the Land Commission held that on the entire evidence the landlords had substantially made good their contention, and, while they affirmed the principle on which the fair rents had been fixed, slightly reduced the allowance for kelp seaweed given by the Sub-Commission.

The tenants appealed to the Court of Appeal.

Cherry, K.C., and *Healy, K.C.* (with them *Clancy*), for the appellants, cited *Gloster v. Ryan* (1); *Boyle v. Foster* (2); *Derham v. Hamilton* (3); *M'Conaghy v. Gledstanes* (4); *Blackpool Pier Company v. Fylde Union* (5).

O'Connor, K.C., *Fetherstonhaugh, K.C.* (with them *Herbert Shaw*), for the respondents.

Coll, for the Board of Trade.

Nov. 20.

LORD ASHBOURNE, C.;—

This case was opened by Mr. Cherry as involving issues of law of magnitude and importance; but from my point of view it involves mainly issues of fact, and when we arrive at a clear conclusion on the questions of fact it seems to me that the questions of law almost settle themselves.

In this case the Land Commission reviewed on appeal the order made by the sub-Commission of which Mr. Falkiner was

(1) 1 Greer, 240.

(2) 30 L. R. Ir. 623.

(3) 31 I. L. T. R. 120.

(4) [1895] 2 I. R. 433.

(5) 46 L. J. M. C. 189.

chairman, slightly altering the amount of the fair rent, but affirming the principles stated by Mr. Falkiner in his well-considered judgment (1).

It appears that the Sub-Commission in fixing the fair rent assessed the facilities for procuring seaweed at the sum of £1, and they explained this item in the "Pink Schedule" by this statement:—"In estimating the amount placed upon seaweed in paragraph 5, the value of seaweed on the seashore and the immediate vicinity thereof, not merely for manure, but also for the making of kelp on the holding, has been taken into consideration." It is with reference to this statement that the controversy in the present case has arisen. The controversy is a narrow one. Mr. Cherry admits that so far as the seaweed is used for manure, the facility for obtaining it is a circumstance to be taken into account in fixing a fair rent, but he contends that so far as the seaweed is capable of being used for kelp, it should not be taken into account. This is the single point at issue, for during the argument counsel for the landlord disclaimed on his behalf any idea of claiming rent in respect of any seaweed obtained in the deep sea, and expressly limited his claim to the case of seaweed growing on the foreshore or drifting on the foreshore.

I am afraid that kelp-making is not a growing or remunerative industry, but that is no reason why the rights of the parties should not be fully and carefully considered.

According to Mr. Cherry's argument, if the seaweed is cut to be used for making kelp it becomes at once a sacred thing, to which rent cannot attach. But the use of the seaweed—whether for making manure or for making kelp—would depend on the intention of the tenant, and, therefore, if Mr. Cherry's argument is right, the answer to the question whether in fixing the rent the value of the facilities for obtaining seaweed is to be taken into account, would depend on the intention of the tenant. Again, the tenant might cut the seaweed with the intention of using it for kelp, but finding it inconvenient or unremunerative to make it into kelp, he might change his mind and turn it into manure. Is it possible that the right to rent on a valuable product, for obtaining which the holding affords facilities, is to vary with the intention or even with the change of mind of the tenant as to the purpose

Appeal.
1902.

NOLAN,
Landlord;
LEE,
Tenant.

BERRIDGE,
Landlord;
FOLAN,
Tenant.

Lord
Ashbourne, C.

Appeal.
1902.
NOLAN,
Landlord;
LEE,
Tenant.
BERRIDGE,
Landlord;
FOLAN,
Tenant.
Lord
Ashbourne, C.

to which he will devote it, or the mode in which he will deal with it? In my opinion, once the Land Commission ascertain as a fact that the facility for obtaining seaweed is a valuable adjunct to the holding, the purpose to which the tenant applies or intends to apply the seaweed cannot affect their duty to attach value to it in fixing the rent.

As between landlord and tenant—Mr. Coll attends on behalf of the Crown and states that the Crown does not admit the title of either—but as between landlord and tenant we must take it that the foreshore belongs to the landlord, and this is admitted by Mr. Cherry. Accordingly, if the foreshore on which the seaweed is cut forms part of the holding, I do not see how it is possible to argue that the seaweed—no matter for what object it is to be used—is not to be taken into account in fixing the fair rent. But supposing our decision cannot be rested on the ground that the foreshore is included in the holding, how can the facility for obtaining seaweed escape the liability to rent on the ground that is more amplified by Meredith, J.? The facility for obtaining seaweed is afforded to the tenant by the holding. No one contends that it is as a member of the public that the tenant cuts the seaweed. The right to gather it for manure or kelp, or for any other purpose, is a right enjoyed by the tenant by virtue of his tenancy and in respect of his holding. This facility, privilege, or right—which the evidence shows has in some instances even been sublet—is plainly, if not part of the holding, at least one of “the circumstances of the case, holding, or district,” and as it enhances the value of the holding, the Land Commission are bound, under section 8 of the Land Law Act of 1881, to take it into account in fixing the fair rent.

It has not been contended, nor could it be contended, that the right to cut seaweed for kelp is an incorporeal hereditament which forms such a distinct and substantive part of the property demised that it could be separated from the rest of the holding under section 5, sub-sect. 2, of the Act of 1896.

We have, of course, nothing to say as to the amount of the rent put upon this seaweed. That is not for us. We have only to deal with the wider question submitted to us, and we have come to the conclusion that the judgment of Meredith, J., is correct, and that his decision should be affirmed with costs.

FITZ GIBBON, L.J. :—

It is hard to find out what question of law we are asked to decide. The "Pink Schedule"—the only document to which we can look for the facts—says :—"In estimating the amount placed upon seaweed in paragraph 5, the value of seaweed *on the seashore and the immediate vicinity thereof*, not merely for manure, but also for *the making of kelp on the holding*, has been taken into consideration." In the light of this statement, we must read the judgment of Meredith, J., as amounting merely to an affirmation that in fixing the fair rent the value of seaweed used for making kelp—there being no dispute as to its being rightly assessable if used as manure—was rightly taken into account. In other words, his decision is only a refusal to hold that the question whether a valuable item is to go into the calculation of the rent is to depend, not upon the relation of that item to the holding, but upon the use to which the tenant puts it. The use is, no doubt, a matter on which the tenant may exercise knowledge, industry, or skill, and the amount of his profit may depend on that, but the subject-matter demised by the landlord, and on which the rent is to be fixed, must be the same, no matter how the tenant uses it. What answer can be given to the case of the sheep, put by Walker, L.J. ? If the tenant of a sheep-farm, instead of selling his wool, turns it into homespuns on the holding, and thereby makes a greater profit out of it, is the sheep-carrying value of the farm to be eliminated from the fair rent, or is the tenant's rent to be less because he makes more money by spinning his wool on the holding than if he sold it to be spun elsewhere ?

The use to which holdings are sometimes put by slovenly tenants of allowing them to grow weeds instead of crops would be an illustration on the other side of the account.

In my opinion, as soon as it is ascertained that any valuable interest or subject-matter is so connected with the holding as to affect its letting value, it must be considered in determining the fair rent, and it becomes immaterial to consider what use the tenant intends to make of it, except for the purposes of fair apportionment between landlord and tenant, and of amount of rent, with which we have no jurisdiction to deal. Therefore, the

Appeal.
1902.

NOLAN,
Landlord;
LEE,
Tenant.
BERRIDGE,
Landlord;
FOLAW,
Tenant.

Appeal.
1902.

NOLAN,
Landlord;
LEE,
Tenant.

BERRIDGE,
Landlord;
FOLAN,
Tenant.

Fitz Gibbon,
L.J.

only definite question which I can discover in the case appears to me to have a self-evident answer.

The rest of Mr. Cherry's argument raised only a question of fact—viz. whether the relation between the kelp seaweed and the holding was sufficiently close to justify the Land Commission in treating the taking and use of the weed by the tenant as a "circumstance of the holding" which should be considered in fixing the fair rent.

All the evidence tends to show that the foreshore is within the ambit of the holding, and there is no evidence the other way. At all events it is used by the tenant by virtue of his tenancy. The evidence of long-continued and exclusive cutting of the seaweed by the tenants of the estate; the agent's meeting them and marking out a distinct portion of the shore on which each tenant was to cut; and the evidence that no one else cut any, make a *prima facie* case of possession in the landlord against the Crown. The tenants cannot have the fee, and their use of the foreshore must—at best—be referred to their tenancies in the adjoining lands: whether the foreshore be actually part of the holding, or whether the right to cut the weed upon it is appurtenant to the holding, or rests upon the permission of the landlord, the value of this incident must increase the letting value, and consequently the fair rent, of the holding.

Even assuming that the foreshore is not part of the holding, the position of the holding with respect to it, and its proximity, and the advantages which it enables the tenant to enjoy, "not merely for manure, but also for the making of kelp on the holding," are circumstances quite as legitimately affecting the fair rent as the proximity of a market town, or the facility of getting manure, or any other valuable thing, in "the immediate vicinity," and these circumstances are constantly taken into account, and even entered on "Pink Schedules" as reasons for increasing fair rents by defined percentages. The facility for obtaining seaweed for the manufacture of kelp on the holding could not be "treated as a separate holding," under the Act of 1896, section 5 (2), but being a circumstance of the holding which increases its letting value, it must come within the jurisdiction and duty of the Land Commission to consider it when fixing the rent. The "Pink

Schedule" purports to restrict this consideration to seaweed "on the seashore, and in the immediate vicinity thereof." This may be too strict, and in the arguments counsel confined the landlord's claim only to such seaweed as could be reached from the foreshore, or by wading out a little distance from it—in short, the claim has been confined to treating the holding as a *ποῦ στῶ* from which the tenant can collect it. Surely it is a circumstance of the holding which increases its letting value, and which is justly to be taken into account in fixing its fair rent, that within reach of it there is a natural supply of a valuable commodity which can be manufactured and made profitable upon it, or which may be sold by the tenant, who enjoys this advantage by virtue of his tenancy, and obtains it by means of his possession of the holding. Upon this proposition, the only one which we can consider, I see no room for doubt.

The amount of increased letting value, or of rent that ought to be attributed to this item, is to be determined by the statutory tribunal by some expert "rule of thumb," and the Act of 1881, section 48 (2), expressly prohibits any appeal from its judgment upon the amount to be allowed.

WALKER, L.J.:—

We must take it here that as between landlords and tenants the foreshore was acquired by the landlords, and that it has been let to the tenants as part of each holding. The seaweed then is a valuable thing which each tenant gets by reason of his tenancy. He may use it for making kelp; he may use it for making manure, or he may sell it: some of it is suitable for any of these uses, and to which of them it is to be applied depends on the intention of the tenant. But we cannot hold its liability to be taken into account as a rent-producing factor to depend on the intention of the tenant. It is exactly like the case of the wool of sheep, which, as I pointed out during the argument, may be devoted to different purposes as the tenant may choose. The power of getting seaweed for kelp on the foreshore, or in its immediate vicinity, is a facility attached to the holding itself, which can be used for the purpose of getting a profit out of it, and is accordingly a subject-matter for rent.

Appeal.
1902.

NOLAN,
Landlord;
LEE,
Tenant.
BERRIDGE,
Landlord;
FOLAN,
Tenant.

Fitz Gibbon,
L.J.

Appeal,
1902.

HOLMES, L.J. :—

NOLAN,
Landlord;
LEE,
Tenant.
BREIDIDGE,
Landlord;
FOLAN,
Tenant.

I am satisfied by the evidence that each of these tenants occupies, as part of his holding, a portion of the foreshore, marked out by metes and bounds; and as the holdings are substantially agricultural and pastoral, the fair rent is to be fixed on them, taken in their entirety, including the portions of the foreshore attached thereto. It is immaterial whether the landlords are entitled to the foreshore as against the Crown or not. I am disposed to think that there is sufficient evidence to establish this right; but I cannot decide it in the absence of the Attorney-General; and it is enough for my present purpose to say that the tenants, whose only title is through their landlords, are not at liberty to controvert it. The value of the foreshore to the tenants consists in the seaweed that grows or is washed up on it. This seaweed is of two kinds—one black in colour, and only suited for manure; the other red, fit for manure, but also used for making kelp. Both kinds are as much to be attributed to the holdings as the grass or potatoes that grow thereon; and are equally to be taken into account in fixing the fair rent. The distinction sought to be drawn between the use of the seaweed for manure and its use for kelp cannot be sustained. If an idle or eccentric tenant did not use it at all, or sold it, or made it a present to a neighbour, he would still be liable to have his rent increased by reason of its existence, even although he did not profit by it. There is other seaweed cut or gathered by the tenants in boats at a distance from the land; but the landlords have disclaimed any right to rent in respect thereof; and the fair rent has been arrived at without taking it into consideration. Regard, in fact, has only been had to seaweed either actually on the foreshore, or seaweed which was being washed up to it. We have no jurisdiction in this Court to investigate the amount of the fair rent; but I do not doubt that, in ascertaining it, the Land Commission acted on a correct principle.

Solicitor for the appellants : *J. C. Conroy.*

Solicitors for the respondents : *H. Concannon, and Messrs. Crozier & Son.*

G. Y. D.

HORRIGAN *v.* HORRIGAN.

(1902. No. 94.)

V.-C.
1903.Nov. 12.
Dec. 21.*Will—Condition, precedent or subsequent.*

A testator left the residue of his property, real and personal, to his only son, provided he should claim same within three years from the testator's death; and in case the son should have died in his lifetime, or without claiming said bequest within three years, it should lapse; and in the event of the bequest lapsing, or not being claimed within the said period, testator left the residue to his brother, who should also be entitled to the rents and profits of same during the three years, or such lesser period as should elapse before the son should claim.

The son was abroad at the time of his father's death, and did not become aware thereof, or of the terms of the will, until after the expiration of the three years. He contended that the condition was a condition subsequent, and that he, being heir-at-law, did not forfeit the real estate by the non-performance, through ignorance, of the condition:—

Held, that the condition was a condition precedent, and that, accordingly, the gift over took effect.

ACTION.

By his will, dated the 18th July, 1895, John Horrigan, after appointing executors and leaving certain legacies and an annuity, dealt with the remainder of his property as follows:—"I leave to my son James Horrigan, now in South Australia (his address being General Post Office, South Australia), all the residue of my property, real and personal, provided that he shall claim same within three years from the date of my death; but this bequest shall not authorise any person to claim as his next-of-kin or personal representative, as this benefit is meant for himself personally; and in case my said son James shall have died in my lifetime, or without claiming said bequest within said three years, it shall lapse; and in the event of said bequest lapsing, or not being claimed within the said period, I leave all the residue of my property to my brother James Horrigan, who shall also be entitled to the rents and profits of same during the three years, or such

V.-C.
1903.
HORRIGAN
v.
HORRIGAN.

lesser period as shall elapse before my said son shall claim same ; and I appoint my said brother James Horrigan my residuary legatee in the event of my said son not claiming within said three years ; and in case my said brother James Horrigan shall die during my lifetime, I bequeath the residue of my property, and all the benefits to which my brother, the said James Horrigan, shall be entitled, to his son James Horrigan, in the same manner as if his name were substituted for his father's in this will."

The testator died on the 10th December, 1896, seized of property held under a lease dated the 28th September, 1814, from Patrick Lahiff to Denis Hogan and his heirs, for lives renewable for ever, and leaving one son, James Horrigan, him surviving.

James Horrigan was at the time resident in Queensland. He did not receive a copy of the will sent to him, and he did not become aware of his father's death, or of the terms of the will, until the month of October, 1901. He immediately claimed the property.

Meantime the testator's brother James Horrigan had died, having devised all his property to trustees upon certain trusts, and amongst others for his daughters Anne and Kate Horrigan for their lives, and they had entered into receipt of the rents and profits of the said leasehold property.

This was an action brought by James Horrigan to establish his title to his father's real estate. The defendants were Anne Horrigan, Kate Horrigan, J. B. M'Dermott, one of the executors of John Horrigan's will, to whom probate had been granted, and the trustees of James Horrigan's will. Kate Horrigan died after action.

D. F. Browne, K.C. (with him *P. Lynch*), for the plaintiff :—

Here the plaintiff was the testator's heir-at-law, and his non-performance of the condition while he was ignorant of its existence did not work a forfeiture. In this respect the heir, as regards realty, stands in a different position from a stranger. The general principle is stated thus in Theobald, *Law of Wills* (5th ed.), 542 :—"A condition subsequent not performed owing to the ignorance of the legatee of its existence, nevertheless works a forfeiture, where the property is given over, whether in the case of personalty or of realty. . . . But this does not apply where the devisee is the

heir who has a title independent of the will." See *Fraunces's Case* (1); *Fry v. Porter* (2); *Malloon v. Fitzgerald* (3); *Burleton v. Humfrey* (4); *Doe d. Kenrick v. Beauclerk* (5); *Doe d. Taylor v. Crisp* (6). This question came before the Court of Exchequer in this country in 1874 in the case of *Murphy v. Broder* (7)—a case almost identical with the present—where the same principle was applied, and it was held that in the absence of notice of the condition the heir's title was not defeated by its non-performance. Here the condition is clearly a condition subsequent. *Murphy v. Broder* (7) is an authority on this point also (see the judgment of Palles, C.B., at pp. 129, 130); but the present is a stronger case than that in favour of vesting. The words "provided that he shall claim same," and the direction that the bequest, if not claimed within three years, should *lapse*, show that the property had been already given and had vested in the son. The gift over in the event of its not being claimed favours this construction, and the judgment on this question in *Murphy v. Broder* (7) applies. That case has been recognised as an authority ever since.

V.-C.
1903.

HORRIGAN
v.
HORRIGAN.

Matheson, K.C., and *Charles Doyle*, for the defendants:—

We do not dispute the principle of law nor question the cases cited; but they are all cases of a condition subsequent, and the rule established by them does not apply to a case where the condition is a condition precedent. In *Murphy v. Broder* (7) Palles, C.B., says (p. 127):—"It is clear that this doctrine can have no application to a case in which the condition is one precedent to the vesting. In all the cases to which the doctrine has been applied (save those in which, prior to the Wills Act (8), the heir took by descent notwithstanding an attempted devise to him) the estate determined to be subsisting was that held under the instrument containing the condition. This pre-supposed the condition to be one upon non-performance of which the estate was liable to be divested." In that case the Court came to the conclusion that there was a vested gift, and that the condition was a condition

(1) 8 Rep. 92 a.

(2) 1 Mod. 300.

(3) 3 Mod. 29.

(4) Amb. 256, 259.

(5) 11 East. 657.

(6) 8 A. & E. 779.

(7) I. R. 9 C. L. 123.

(8) 7 Wm. 4 & 1 Vict. c. 26.

V.-C.
1903.

HORRIGAN
v.
HORRIGAN.

subsequent; but that conclusion was based on the particular words of the will there—"I bequeath the farm held by Michael Broder, *after his term of it*," to Timothy Murphy, if he should return, &c. If the words "after his term of it" had not been in the will, the decision would have been the other way. See the judgment (p. 128): "The only remaining question is one of construction—viz. whether the condition in the will is precedent or subsequent. This depends upon the sense in which the word 'after' is used in the clause..." If the will in that case did not contain those words it would be practically identical with that here. *Murphy v. Broder* (1) is accordingly an authority against the plaintiff. The word "lapse" is accurately used in connection with the death of the plaintiff in the testator's lifetime. The plaintiff took nothing until he claimed, and in the meantime the rents and profits are given to his uncle. In no case in which the gift could not take effect at once was a condition held to be subsequent. In the cases cited the question was the defeasance of a vested estate; but, "if a devise be made to take effect only on performance of some particular duty by the devisee, or upon some particular event, there is no gift unless the condition is fulfilled. And it makes no difference that the event is impossible in its creation, as to go to Rome in three days, or impolitic, or illegal": Theobald, *Law of Wills* (5th ed.), 492. The strictness with which this rule is applied is shown by the case of *Priestley v. Holgate* (2)—a case, moreover, of personalty, conditions with respect to which are more liberally construed. As to the language of the will, see *Powell v. Rawle* (3); *Burgess v. Robinson* (4); see also *Fitzgerald v. Ryan* (5); *Bevan v. Mahon-Hagan* (6). The authorities cited for the plaintiff apply to the case where the heir had entered without notice of a condition subsequent. Here the plaintiff has never been in possession.

Lynch, in reply :—

The words "provided that he shall *claim same*" show that the property was the plaintiff's from the testator's death; and the

(1) I. R. 9 C. L. 123.

(2) 3 K. & J. 286.

(3) L. R. 18 Eq. 243.

(4) 3 Mer. 7.

(5) [1899] 2 I. R. 637. [342.

(6) 27 L. R. Ir. 399; 31 L. R. Ir.

next clause strengthens this view, as it shows that, but for it, the plaintiff's next-of-kin or personal representative would be entitled—that the gift was vested. The direction as to the rents and profits leads to the same conclusion—the clause was only necessary because the property was the plaintiff's from his father's death. Similarly, the use of the word "lapse"—there could be no lapse unless the gift was vested. See the judgment of Palles, C.B., in *Murphy v. Broder* (1), where he deals with the effect of the gift over and the settled rule of construction in such cases, and *Phipps v. Ackers* (2).

V.-C.
1903.
HORRIGAN
v.
HORRIGAN.

THE VICE-CHANCELLOR:—

Dec. 21.

The question in this case arises upon a gift in the will of John Horrigan, a testator residing in this country, of the residue of his real and personal estate to his son James Horrigan, then in South Australia, provided that he should claim the same within three years from the date of testator's death; and in case his said son should have died in the testator's lifetime, or without claiming said bequest within said three years, it should lapse; and that in the event of it lapsing, or not being claimed within the said period, the testator left all the residue of his (testator's) property to his (testator's) brother James, who should also be entitled to the rents and profits of the same during the three years, or such lesser period as should elapse before his said son should claim same; and he appointed his said brother James Horrigan his residuary legatee in the event of testator's said son not claiming within said three years; and in case his said brother James should die during testator's lifetime, testator bequeathed the residue of his property, and all the benefits to which his brother, the said James Horrigan, should be entitled, to his son James Horrigan, in the same manner as if his name were substituted for his father's in the will.

The testator died on the 10th December, 1896, and his will was duly proved.

The plaintiff was then in South Australia, and heard nothing of his father's will or death till October, 1901, and he immediately

V.-C.
1903.

HORRIGAN
v.
HORRIGAN.

thereupon sent in his claim to his father's residuary property left him by the will. His claim was disputed on the ground that he had not claimed the gift within the period of three years from the death of his father, the testator, and that the gift to him had therefore lapsed. He still claimed, contending that the condition was inoperative as being a condition subsequent, not precedent, and it was admitted upon the argument that the question of his right turned upon this.

The property the subject of the gift consisted of both real and personal estate, and, in my opinion, it makes no difference in this case whether the subject-matter was real or personal estate, and the same principle must be applied to both. It depends, of course, on the construction of the gift, which is one to the son James, who is there described as then resident in South Australia, and the subject of gift is all the residue of the testator's real and personal property, and this gift is subject to the condition, clearly expressed, that he is to get it provided that he shall claim it within three years from the death of the testator, which, in my opinion, necessarily imports that he is not to get it unless he claims it within the prescribed period of three years. This is followed by an alternative gift, that in case James should have died during his father's life, *or* without claiming the said bequest within said three years, the gift should lapse. It does not rest there, for it proceeds to provide that in the event of its lapsing, or not being claimed within the said period, the testator (being thus free to dispose of the subject of it) leaves all the residue of his property to his brother, said James Horrigan, who should also be entitled to the rents and profits of the same during the three years, or such lesser period as should elapse before his said son should claim the same.

In my opinion it is on these grounds impossible for the testator's son now to maintain that this was not a condition precedent. I think that the testator has in every possible way shown that his son was not to have any claim to the property, both as to the capital and its income, unless he should claim within the period of three years from his father's death. This he did not do; and although there does not seem to have been any fault on his part in not having sooner heard of his father's death, I cannot, for

that reason, depart from or vary the express terms of the condition.

I hold the condition to be *precedent*, and not to have been performed by the plaintiff.

V.-C.
1903.

HORRIGAN
v.
HORRIGAN.

Action dismissed with costs.

Solicitors for the plaintiff: *P. S. Connolly & Co.*

Solicitor for the defendants: *James A. Doyle.*

D. M'C. M.

GARLAND v. SMYTH.

Will—Construction—Survivor—Other—Gift over—Context.

M. R.
1903.

July 29.
Nov. 9.

Appeal.
Nov. 28, 30.

By his will a testator gave legacies in trust for his three illegitimate children—£400 for T., £300 for R., and £400 for E., a married woman, for her separate use. The will then provided as follows:—"And in case of the decease of any or either of them, the said T., R., and E., without issue, or leaving issue who shall not live to attain his, her, or their age of twenty-one years, I order and direct that the said several and respective sum and sums of money so hereby left and bequeathed to and for them, the said T., R., and E., shall go and be equally divided between the survivors and survivor of them, for and during the term of their natural lives, and to their issue after their respective deaths who shall live to attain the age of twenty-one years."

There was no gift over in the event of all the three legatees dying without issue. The will appointed a brother of the testator (who predeceased him) residuary legatee.

R., who was unmarried, predeceased the testator. A suit was brought for the administration of testator's estate, and the assets were lodged in Court, and proved insufficient to pay the legacies which had to abate rateably. E. died in 1865, leaving children, all of whom attained twenty-one. T. died in 1900 unmarried.

At the date of T.'s death the funds in Court represented a moiety of the legacy of £300 given to R., with a bequest over, and the legacy of £400 originally bequeathed to T., with a gift over. The children of E. applied for payment out of the funds in Court:—

Held, on the construction of the will, that the children of E. took no interest in the funds in Court, in which T. had a life interest, because their mother did not survive him, and that the word "survivor" must be read in its ordinary signification, and not as meaning "other," with the result that there was an intestacy as regards these funds.

M. R.
1903.
GARLAND
v.
SMYTH.

SUMMONS.

By his will, dated 26th January, 1840, Robert Baylor devised the lands of Derrivillane to Henry Smith upon trust for his illegitimate son Thomas for life, and after his decease for his child or children attaining twenty-one, in such shares as he should appoint, and in default of appointment, if more than one child, as tenants in common, and in default of such child, children, or issue, upon similar trusts for testator's illegitimate son Richard, his child, children, or issue, as in the case of Thomas, and in default then upon similar trusts for testator's reputed daughter Ellen Nolan, her child, children, or issue (but as to her life interest for her separate use), as in the case of Thomas, and on failure of the trusts aforesaid there was a gift over in favour of testator's nephew, Arthur Baylor.

After other devises and bequests testator provided as follows :—
“ I leave and bequeath unto my said illegitimate and reputed son Thomas Baylor the sum of £400 ; I leave and bequeath unto my said illegitimate son Richard Baylor the sum of £300 ; I leave and bequeath unto the said Henry Smith, his executors, administrators, and assigns, the sum of £400 in trust for the sole, separate, and only use and benefit of my said illegitimate daughter Ellen Nolan, and to be at her disposal notwithstanding her coverture, &c., and in case of the decease of any or either of them, the said Thomas Baylor, Richard Baylor, and Ellen Baylor, without issue, or leaving issue who shall not live to attain his, her, or their age of twenty-one years, I order and direct that the said several and respective sum and sums of money or legacies, so hereby left and bequeathed to and for them, the said Thomas Baylor, Richard Baylor, and Ellen Nolan, shall go and be equally divided between the survivors and survivor of them for and during the term of their natural lives, and to their issue after their respective deaths who shall live to attain the age of twenty-one years.”

Testator bequeathed all the rest, residue, and remainder of his estate not thereinbefore disposed of unto his brother John Baylor, whom he appointed one of his executors.

Robert Baylor died unmarried on 14th April, 1849, and probate of his will was on 3rd July of that year granted to Henry Smyth, one of the executors named in the will. John Baylor,

the other executor and residuary legatee named in the will, predeceased the testator.

Richard Baylor died unmarried on 6th September, 1842.

In 1852 a suit was instituted for the administration of the estate of Robert Baylor, and the assets of the testator were pursuant to order lodged in Court to the credit of the cause, and afterwards to the separate credits of the parties entitled thereto. The assets proved insufficient to pay the legacies bequeathed by testator's will in full, and they had to abate rateably.

By order of 13th May, 1853 (confirming the Master's Report), £2 17s. 2d. cash and £176 Government 3½ per cent. stock were transferred to the separate credit of sum bequeathed to Richard Baylor, with a bequest over, and £3 16s. 3d. cash and £234 2s. 10d. Government 3½ per cent. stock were transferred to the separate credit of Thomas Baylor, with a bequest over. Ellen Nolan died in 1865. One moiety of the funds in Court representing the legacy to Richard Baylor, with a bequest over, was after her death paid to her children, all of whom had attained twenty-one.

Thomas Baylor died in Australia, in poverty, intestate, and unmarried, in 1900. He never entered into possession of the lands of Derrivillane.

An application was made on behalf of Mary Howard, for herself and the other children of Ellen Nolan, for payment out to them of the funds in Court.

By order of 14th July, 1903, Thomas Bailey was appointed to represent all the legatees under the will of Robert Baylor for the purposes of the determination of the question arising on the construction of the will.

R. W. Lucas, in support of the application :—

In the events that have happened the children of Ellen are entitled to the funds in Court. Their right does not depend on the accident of their parent surviving her brother Thomas. The gift over is to the survivors or survivor of the three children for life and to *their* issue (not their *respective* issue) on attaining twenty-one. The issue take as purchasers, and are direct objects of the testator's bounty. The attainment of twenty-one is the contingency pointed at, and not the chance of the survival of the parent.

M. R.
1903.

GARLAND
v.
SMITH.

M. R.
1903.
GARLAND
v.
SMYTH.

Even if this is not the plain construction of the words used, the intention to keep these segregated funds or legacies in the family of testator's natural children is manifest, and to carry out that intention, whether expressed or implied, the Court will read "survivor" as "other," or as meaning "surviving in stock." The slightest indication in the context will suffice: Jarman on Wills, p. 1520. The context shows that it is not the survival of the parent alone that entitles the issue of a child to participate in an accrued share, but the time for ascertaining the class is the attainment of twenty-one. The intention is to provide for the line of issue of each child as well as for the child itself in respect of an accrued share, and that is enough to alter the ordinary meaning of "survivor." If there is any ambiguity in the words used the Court will adopt that possible meaning which is in conformity with the scheme of disposition. The intention, however in-artificially expressed, will be carried out in favour of those who are clearly the objects of testator's bounty. See observations of Lord Cranworth in *Smith v. Osborne* (1), of Lord Selborne in *Waite v. Littlewood* (2), and of Fitz Gibbon, L.J., in *O'Brien v. O'Brien* (3); *In re Bowman* (4). The strict settlement of the lands of Derrivillane on Thomas, Richard, and Ellen, for life, and their issue in succession, with a gift over, in the event of there being no issue of any one of them, shows the scheme of disposition as regards the three objects of testamentary solicitude. That alone is sufficient context to enable the Court to read "survivor" as "other" in the clause under discussion: *Hawkins v. Hamerton* (5); *Holland v. Allsop* (6).

No doubt in the clause itself there is no ultimate gift over in the event of all the three legatees dying without issue, but that is not necessary: *Eyre v. Marsden* (7); *Beck's Trusts* (8); *In re Blantern* (9); *In re Bowman* (4); *Re Connellan's Trust* (10); *Walker's Estate* (11); *Williams v. James* (12); *Hawkins v. Hamerton* (5);

(1) 6 H. L. Cas. 393.

(2) L. R. 8 Ch. 70.

(3) [1896] 2 I. R. 479-481.

(4) 41 Ch. D. 525.

(5) 16 Sim. 410.

(6) 29 Beav. 498.

(7) 4 M. & Cr. 231.

(8) 16 W. R. 189.

(9) W. N. 1891, 54.

(10) 16 Ir. Ch. R. 524.

(11) 12 Ch. D. 205.

(12) 20 W. R. 1010.

Aiton v. Brooks (1); *Re Arnold's Trusts* (2); *Holland v. Allsop* (3). It is only in the absence of an ultimate gift over that there is any difficulty about changing the word into "other." An ultimate gift over is conclusive. In *O'Brien v. O'Brien* (4) the only controversy was whether "survivor" was to be read "other," or was to receive what is called the stirpital construction. It was not there argued that the word could be read in its ordinary signification.

M. R.
1903.
GARLAND
v.
SMYTH.

For a long period the Courts strove to lay down stereotyped rules of construction as regards the interpretation of such words as "survivor" or "then surviving," but most recent decisions show there can be no such rules. In every case it is a matter of construction. See judgment of Vaughan Williams, L.J., in *Inderwick v. Tatchell* (5). "We seem (he says) in this case to have arrived at this point, that there is no hard and fast rule to enable you to say when you are to follow the literal construction and when you are not."

In *Re Benn* (6) the context actually negated the reading of "surviving" as "other." In order to do so in that case the word must have been read in two different senses in the same disposition, and the attainment of twenty-one was not the contingency provided for, as is the case in this will; and in *Harrison v. Harrison* (7) (as in *Benn's Case* (6)) the gift was to "their respective issue." Why should "their issue" in this case necessarily mean "their respective issue," with the present result of an intestacy as regards these legacies in which no issue of a natural child can have any share, a result which it is impossible to conceive that this testator could have intended?

The decision of Kay, L.J., in *Re Bowman* (8) is disapproved of only so far as it seeks to bind the Courts to the adoption of any rule of universal construction by reason of an accrued share being settled in the same way as an original share, and by reference thereto.

(1) 7 Sim. 204.

(2) L. R. 10 Eq. 252.

(3) 29 Beav. 498.

(4) [1896] 2 I. R. 459.

(5) [1901] 2 Ch. 738, 745.

(6) 29 Ch. D. 839.

(7) [1901] 2 Ch. 136

(8) 41 Ch. D. 525.

M. R.

1903.

GARLAND

F.

SMYTH.

G. C. Green, for the *legitimus contradictor*:—

There is no gift over on the death of all the legatees without leaving children, and consequently the words “survivors or survivor” must receive their literal and ordinary interpretation: *In re Benn* (1). That decision of the English Court of Appeal disapproves of *In re Bowman* (2), and the terms of the will in that case are practically the same as those of the present one. The effect of recent decisions is, that the word “survivor” must be read in its natural sense unless there be an ultimate gift over: *Harrison v. Harrison* (3). The gift over is what supplies the necessary evidence of an intention to use the word “survivor” in the secondary sense of “other”: *Wake v. Varah* (4). In both *Waite v. Littlewood* (5) and *Badger v. Gregory* (6) there was an ultimate gift over. In *Beckwith v. Beckwith* (7), James, L.J., in referring to his own decision in *Badger v. Gregory* (6), says:—“There the gift over showed an intention that the property was not to go over unless all the issue failed, and that there was a reasonably plain intention that the issue should take upon the failure of whom only the gift over was to take effect. That appeared to afford a sufficient indication of the intention of the testator to create what are called cross-limitations among the children. But in the absence of any such ground for raising the implication, I am of opinion that we must leave the words to bear their ordinary natural and grammatical interpretation.”

Nov. 9.

THE MASTER OF THE ROLLS:—

I should have been very willing to yield to the argument so ably urged on the part of the applicant had it been possible to do so. But to read “survivor” as “other” is to do violence to the language used; and though the context may in some cases lead to that result, a clear context is needed. In cases where there is a gift over in the event of *all* the legatees dying without issue, the Courts have held that that circumstance may amount to a coercive context; since it could hardly be supposed that the testator in-

(1) 29 Ch. D. 839.

(2) 41 Ch. D. 525.

(3) [1901] 2 Ch. 136.

(4) 2 Ch. D. 348.

(5) L. R. 8 Ch. 70.

(6) L. R. 8 Eq. 78.

(7) 46 L. J. Ch. 97.

tended that if one of them had predeceased, leaving issue, he was to die intestate as to the legacy. But here there is no gift over. The legacies are separate (in the first instance), and differ in amount : and I can see no reason why I should strain the language so as to do what it is not clear the testator even meant to do. *Re Benn* (1) is a clear authority for this : and I must therefore make no rule on the motion. The question is, however, of such a character, and the circumstances are such, that it is reasonable that the parties should both have their costs out of the fund in question ; and it must be referred to Chambers to inquire and report who is or are, consistently with these directions, entitled to the funds in Court, and in what shares and proportions.

R. W. L.

M. R.
1903.GARLAND
v.

SMYTH.

The applicant appealed to the Court of Appeal (Fitz Gibbon, Walker, and Holmes, L.JJ.).

Appeal.
Nov. 28, 30.

Jellett, K.C., and *R. W. Lucas*, in support of the appeal.

D. F. Browne, K.C., and *G. C. Green*, *contra*.

THE COURT dismissed the appeal with costs.

Nov. 30.

Solicitor for the applicant : *R. S. Baylor*.

Solicitor for Thomas Bailey : *John Tapley*.

G. Y. D.

Appeal.
1902.

BYRNE v. CULLINAN (1).

Dec. 3, 4. *Power—Execution—Special power—Intention to execute—Reference to power.*

Where it is manifest, on the construction of a will, that the testator intended to dispose thereby of property of his own and also of property over which he had a special power of appointment, and under the disposition made by the will the property, subject to the power, is given to a member of the class amongst whom it can be appointed, the property passes under the power, it being immaterial whether the testator supposed that the property passed by the power or by virtue of his own interest therein.

APPEAL by the defendant Patrick Cullinan against so much of an order pronounced on the trial of this action by the Right Hon. The Vice-Chancellor of Ireland on the 20th July, 1902, as declared that the bequest to Joseph Cullinan, referred to thirdly in the 5th paragraph of the statement of claim, was not an effectual appointment by Martin Cullinan of the lands of Waterview, under the powers conferred upon him in respect of the said lands by the settlement of the 18th November, 1854, and that same accordingly went in default of appointment to the persons entitled thereto in the events under the said settlement, subject to the life estate therein of the said testator's widow Elizabeth Cullinan; and against so much of the said order as declared that the interest acquired by the said defendant Patrick Cullinan in the said lands of Waterview, as mentioned in the pleadings, was a graft upon the interests acquired under the original leases under which the same were held, and that the said lands of Waterview were subject to the trusts of the said settlement of 18th November, 1854; and against so much of the said order as directed an account to be taken in Chambers of the rents and profits of the said lands of Waterview from the 30th March, 1881, the day of the death of the said Martin Cullinan, and by whom received; and against so much of the said order as directed the said defendant Patrick Cullinan to pay to the plaintiff

so much of her costs incurred in this action, up to and including the hearing thereof, as were occasioned by reason of the claim of the said defendant Patrick Cullinan to be beneficial owner of the said lands of Waterview.

At the trial of this action no witnesses were produced; the documents mentioned in the pleadings, and a correspondence hereinafter mentioned, together with certain orders and proceedings made and taken in the matter of the defendant Elizabeth Cullinan, a person of unsound mind, being the only evidence entered by the parties.

The plaintiff's statement of claim was as follows:—

1. By a settlement executed on the occasion of the marriage of the father and mother of the plaintiff, dated the 18th day of November, 1854, and made between Martin Cullinan (the father of the plaintiff) of the first part, Anne Regan and Elizabeth Regan (the mother of the plaintiff) of the second part, and Richard Newman Somerville and Michael Cullinan (the trustees thereof) of the third part, in consideration of the then intended marriage of the said Martin Cullinan with the said Elizabeth Regan (which shortly afterwards took place), the said Martin Cullinan granted, &c., to the said Richard Newman Somerville and Michael Cullinan as such trustees—(a) one undivided fourth of the rents and profits of the fee-simple lands of Mountbrown; (b) part of the lands of Waterview, being the land called Brown's Farm, with Furlough, thereunto belonging, held under lease of 22nd March, 1817, for the lives and years therein mentioned; (c) the lands of Waterview, held under lease dated 23rd June, 1854, for twelve years from 1st November, 1853, at the yearly rent of £202 2s. 11d. To hold upon trust after the said marriage to the use of the said Martin Cullinan and his assigns upon trust to receive the rents of said fee-simple lands of Mountbrown for life, and to receive the rents and profits of Brown's Farm and Waterview for the residue of the terms created by the leases under which the same were held, provided he should live so long, and after his decease, during the continuance of the said terms respectively, to the use of the said Elizabeth Regan (the defendant Elizabeth Cullinan), if she should survive him (which is the event which happened), upon trust to receive the rents and profits thereof for her life, and after the decease of

Appeal.
1902.

BYRNE
v.
CULLINAN.

Appeal.
1902.
BYRNE
v.
CULLINAN.

the said Martin Cullinan and Elizabeth Regan to the use of the children of the said marriage, as the said Martin Cullinan should in his lifetime by writing appoint, and in default of such appointment as the said Elizabeth Regan should by deed appoint, and in default thereof to the children of such marriage equally; with a power of sale of the said fee-simple lands of Mountbrown by the said trustees, and investment of the proceeds thereof in the purchase of real or leasehold property to be held upon the same trusts as the said lands of Mountbrown, and a power of appointment of new trustees by the said trustees or the survivor with the consent of the said Martin Cullinan and Elizabeth Regan, or the survivor of them.

2. There was issue of the marriage of the said Martin Cullinan and Elizabeth Regan several children, all of whom died in infancy, except the following five children, who all attained twenty-one years of age, viz.:—Joseph Cullinan, Christopher Cullinan, Elizabeth Cullinan (since deceased), Agnes Cullinan, otherwise Byrne (the plaintiff, who subsequently married and is now the wife of Dr. H. U. Byrne), and Maude Cullinan (since deceased).

3. The said Elizabeth Cullinan died on the 18th day of January, 1899, having by her will, which was proved on the 23rd day of January, 1901, given and bequeathed all her property of every kind to the plaintiff; and the said Maude Cullinan died intestate and unmarried in the year 1886.

4. By indenture, dated the 31st day of March, 1874, certain lands therein and in the will of the said Martin Cullinan (set out in paragraph 5), called Tavnagh, were settled upon the said Elizabeth Cullinan for life, with remainder to the said Martin Cullinan for life, with remainder to trustees to raise £1000 for the children of the marriage, and subject thereto the said lands of Tavnagh were to be held for the benefit of the children of the said marriage as the said Martin Cullinan should by deed or will appoint, and in default to the use of Joseph Cullinan and the heirs of his body.

5. By his said will, dated 27th day of March, 1881, the said Martin Cullinan made the following bequests in the words and figures following:—"In the name of God. Amen. I, Martin Cullinan, of Waterview, county of Galway, hereby make and publish this my last will and testament. I desire to be buried in

my family burial-place at Lackagh. Whereas I have not by me the documents which relate to my affairs, I desire to make my will to meet all possible contingencies. 1st. I leave the estate of Tavnagh, if I have power so to leave it, to my three daughters and my son Christopher, share and share alike, as tenants in common, and not as joint tenants, and if that should be done by appointment I execute this will as a deed of appointment and seal it. 2nd. I leave the £1000, if devise be valid of No. 1, in equal shares to my three daughters and my son Christopher, share and share alike, and if such should be done by appointment by deed, I execute this will as a deed. The £1000 I refer to are invested in the funds. 3rd. If Nos. 1 and 2 stand valid, I leave and bequeath all else I die possessed of, subject as herein, to my son Joseph, leaving him also whatever rights I have in the Costello property. 4th. If No. 3 stand in force by reason of Nos. 1 and 2 standing valid, I charge, bequeath, and devise No. 3, with all my debts, funeral and testamentary expenses. 5th. If Nos. 1 and 2 shall not stand valid by reason of the estate of Tavnagh being possibly settled on Joseph, I leave then all mentioned and dealt with in Nos. 2 and 3 to my three daughters and my son Christopher, share and share alike, save that I leave the Costello property to Joseph, and I charge this disposition, No. 5, with payment of all my debts, funeral and testamentary expenses, save they do not attach to the Costello property. 6th. In any instance my wife is to have the life use of Tavnagh, and a right to reside at Waterview for her life. 7th. My three daughters and my son Christopher shall each have a right to reside at Waterview, each until he or she reach eighteen years; but such residential right shall cease to each who reaches that age." And after a pecuniary bequest of £5, testator appointed his brother Michael, and the said Michael's son Patrick (being the defendant Patrick Cullinan), executors and trustees and guardians of the persons and fortunes of his children.

6. The testator Martin Cullinan died on the 30th day of March, 1881, and probate of his will was granted to Michael Cullinan, one of the executors, on the 14th day of May, 1881, the other executor, Patrick Cullinan, having duly renounced.

7. The said Michael Cullinan died on the 29th day of March, 1897, having by his will, dated the 28th day of June, 1896,

Appeal.
1902.

BYRNE
v.
CULLINAN.

Appeal.
1902.
BYRNE
v.
CULLINAN.

appointed the defendants Patrick Cullinan and William Kirwan executors thereof, and probate of the said will was granted on the 23rd day of September, 1897, to the said defendants Patrick Cullinan and William Kirwan.

8. At the date of his death, on the 30th day of March, 1881, the said Martin Cullinan was in occupation and possession of the entire of the said lands mentioned in paragraph 1, and the plaintiff was then about eight years of age.

9. Immediately after the death of the said Martin Cullinan, his son Joseph Cullinan, with the assent and concurrence of the said Michael Cullinan, the executor and trustee of his will, entered into possession and receipt of the rents and profits of the entire lands of Waterview (being the lands *b* and *c* set forth in paragraph 1 hereof).

10. On the 14th day of November, 1888, an agreement and declaration, pursuant to the Land Law (Ireland) Act, 1881, was filed in the Court of the Irish Land Commission, fixing the fair rent of the said lands of Waterview (being the lands *b* and *c* mentioned in paragraph 1 hereof) at the sum of £275 15s. 6d. per annum, in the name of the said Joseph Cullinan as tenant thereof, and the said Joseph Cullinan remained in possession and receipt of the rents and profits thereof down to the month of January, 1896.

11. On the 16th day of May, 1893, a petition was presented to the Lord Chancellor of Ireland by Michael Cullinan and the defendant Patrick Cullinan for an inquiry into the soundness or unsoundness of mind of the defendant Elizabeth Cullinan, and by an order, dated the 15th day of July, 1893, and made in the matter of Elizabeth Cullinan, a person of unsound mind, the said Elizabeth Cullinan was declared to be a person of unsound mind, and incapable of managing her person or property, and by another order made in the said lunacy matter, dated the 15th day of March, 1894, confirming the Registrar's report therein, the custody, regulation, occupation, disposition and receipt of the lunatic's estate was committed and granted to the defendant Denis J. Kirwan, who was appointed receiver thereover.

12. Richard Newman Somerville, one of the trustees of the settlement of the 18th of November, 1854, mentioned in para-

graph 1, having died, by an order made in said lunacy matter, and dated the 9th day of June, 1894, it was ordered that the defendant Denis J. Kirwan, as her committee, should be at liberty to consent in her name to the appointment of the defendant Patrick Cullinan as a new trustee of the said settlement.

Appeal.
1902.

BYRNE
v.
CULLINAN.

13. By indenture, dated the 22nd August, 1894, and made between Michael Cullinan (the surviving trustee of said settlement of 18th November, 1854) of the first part, the defendant Denis J. Kirwan of the second part, and the defendant Patrick Cullinan of the third part, the defendant Patrick Cullinan was duly appointed a trustee of the said settlement of the 18th November, 1854, in place of the said Richard Newman Somerville, jointly with the said Michael Cullinan, and the said Michael Cullinan having died on the 29th day of March, 1897, as stated in paragraph 7, the defendant Patrick Cullinan became, and is now, the sole trustee of the said settlement of the 18th November, 1854.

14. The said Joseph Cullinan, who is referred to in paragraph 9 hereof, got into pecuniary difficulties while in possession of the said lands of Waterview, and allowed the same to be taken in execution by the sheriff of Galway under several writs against him.

15. By indenture, dated the 25th day of January, 1896, Richard Galbraith, High Sheriff of the county of Galway, in consideration of £350, assigned to the defendant Patrick Cullinan the interest of the said Joseph Cullinan in the said lands of Waterview, and the said Patrick Cullinan is now, and has been ever since, in possession and occupation thereof.

16. The defendant Patrick Cullinan, notwithstanding the fact of his having been a trustee of the said settlement of the 18th day of November, 1854, at the date of his purchase of the said lands of Waterview, as set out in paragraph 15, claims to be beneficially entitled thereto, and refuses to account for the rents and profits thereof, or to bring the same into the trusts of the said settlement of 18th November, 1854.

17. The plaintiff is unable to ascertain anything connected with, or to receive any account of, the rents and profits or proceeds of the sale (if sold) of the fee-simple lands of Mountbrown, mentioned at (a) in paragraph 1 hereof, and the said defendant Elizabeth

Appeal.
1902.
BYRNE
v.
CULLINAN.

Cullinan, who is under the said settlement of the 18th day of November, 1854, entitled to the rents and profits of the entire of the lands mentioned in paragraph 1, has never received, and is not now receiving, any rents or profits in respect of any of the said lands, or any part thereof, and in the Registrar's report made in said lunacy matter upon the petition of the defendant Patrick Cullinan, and dated the 15th day of March, 1894, none of the lands set forth in paragraph 1 hereof are included as forming any part of the property of the said Elizabeth Cullinan.

The plaintiff claimed :—

1. To have the trusts of the settlement of the 18th day of November, 1854, carried into execution.
2. To have the trusts of the will of Martin Cullinan, deceased, dated the 27th day of March, 1881, carried into execution.
3. If necessary, to have the real and personal estate of the said Martin Cullinan, deceased, administered.
4. A declaration that the interest acquired by the defendant Patrick Cullinan in the lands of Waterview, is a graft upon the interests acquired under the original leases under which same were held, and that the said lands of Waterview are now subject to the trusts of the said settlement of the 18th day of November, 1854.
5. An account of the rents and profits of the said lands of Waterview.
6. An inquiry as to the sale or disposal and rents and profits of the lands of Mountbrowne, in the barony of Clare and county of Galway.
7. Such further inquiries and accounts as may be necessary.
8. Costs and further or other relief.

The defendants Patrick Cullinan and William Kirwan delivered the following defence :—

1. These defendants admit the execution of the settlement of the 18th November, 1854, in the first paragraph of the statement of claim mentioned, but for greater certainty as to the contents, purport, and effect thereof, they beg to refer to the original of the said settlement when produced.

2. These defendants admit the several matters mentioned in the second paragraph of the statement of claim.

Appeal.
1902.

3. These defendants admit the death of Elizabeth Cullinan and of Maude Cullinan, as stated in the third paragraph of the statement of claim. These defendants have no knowledge of the other matters set out in the said third paragraph, and they refer to such proof of the said other matters as the plaintiff may be able to adduce.

BYRNE
v.
CULLINAN.

4. These defendants admit the execution of the indenture of the 31st March, 1874, in the fourth paragraph of the statement of claim mentioned, but the contents of the said indenture are not accurately therein set forth, and they beg to refer to the original of said indenture when produced.

5. These defendants admit that Martin Cullinan executed his last will, dated the 27th of March, 1881, as stated in the fifth paragraph of the statement of claim, but the contents of the said will are not accurately therein set forth, and they beg to refer to the original of the said will and probate thereof when produced.

6. These defendants admit the several matters stated in the paragraphs eight to twelve, inclusive, of the statement of claim, but refer to the documents therein mentioned.

7. These defendants say that, with the consent and by the direction of the said Joseph Cullinan, the plaintiff and her brothers and sisters were partly maintained and educated out of the profits of the said lands of Waterview during their minority.

8. The defendant Patrick Cullinan admits the execution of the indenture, dated the 22nd August, 1894, mentioned in the 13th paragraph of the statement of claim, but says that he became a trustee of the said settlement, dated the 18th November, 1854, under the belief and on the understanding that all the trusts thereof had been executed, save as to a sum of £1068 19s. 6d. consols, and the said indenture of the 22nd August, 1894, contains the following recital:—"And whereas the entire of the said trust property (that is the property settled by the said settlement of the 18th November, 1854), subject to the trusts of said principal indenture, is now represented by a sum of £1068 19s. 6d. new consols standing in



Appeal.
1902.
BYRNE
v.
CULLINAN.

the names of the said Richard Newman Somerville and Michael Cullinan." No property, save the said sum of consols, was vested, or intended to be vested, in this defendant in pursuance of or by virtue of said indenture.

9. The defendant Patrick Cullinan admits the statement contained in paragraphs 14 and 15 of the statement of claim.

10. The defendant Patrick Cullinan says that under the indenture, dated the 25th January, 1896, he is a purchaser for value of the lands of Waterview, and he had not notice of any trusts or equities affecting the said lands.

11. This defendant further says that the will of the said Martin Cullinan operated as a valid appointment to the said Joseph Cullinan of the lands of Waterview in pursuance of the power of appointment contained in the said settlement, dated the 18th day of November, 1854, and that the plaintiff has no estate or interest, legal or equitable, in the said lands of Waterview.

12. The defendant Patrick Cullinan further says that the plaintiff attained her full age of twenty-one years on the 21st day of January, 1892, and after her coming of age she acquiesced in the absolute ownership of the said Joseph Cullinan in the said lands of Waterview, and stood by and allowed the defendant Patrick Cullinan to become the purchaser of the said lands, and, since his purchase, to spend large sums of money on the said lands, and this defendant says that the plaintiff is debarred from asserting any equitable claim against the said lands by laches and acquiescence.

13. The defendant Patrick Cullinan admits that the rights, if any, of the defendant Elizabeth Cullinan were not prejudiced by the will of the said Martin Cullinan, nor does this defendant contend that the said defendant Elizabeth Cullinan did or was capable of any act or omission which could prejudice her rights. This defendant says, however, that he had no notice of the defendant Elizabeth Cullinan's claim on the lands at the date of his purchase, and he refers to the proceedings in lunacy as evidence that no such claim was made on her behalf.

14. The defendant Patrick Cullinan submits that the claim of the plaintiff cannot be supported by the claim, if any, of the defendant Elizabeth Cullinan.

15. As to the lands of Mountbrowne in the 1st and 17th paragraphs of the statement of claim mentioned, these defendants say that the entire of the lands of Mountbrowne are believed to have been sold in the Court for the Sale of Incumbered Estates in Ireland about the year 1857 for the sum of £2450, whereof the sum of £542 10s. was allocated and paid to the said Richard Newman Somerville and Michael Cullinan, the then trustees of the said settlement, dated 18th November, 1854, as the amount representing the value of the portion of the said lands of Mountbrowne comprised in the said settlement. These defendants say that it is believed that the said Richard Newman Somerville and Michael Cullinan invested the said sum of £542 10s. in the purchase of Government Stock, and that same is included in and forms portion of the sum of £1068 19s. 6d. new consols in the said indenture of 22nd August, 1894, mentioned.

Appeal.
1902.
BYRNE
v.
CULLINAN.

16. These defendants further say that before the institution of this action no demand for an account or inquiry was made in respect of the proceeds of the sale of Mountbrowne.

The defendant Elizabeth Cullinan, being a person of unsound mind, delivered the following defence by Denis J. Kirwan, her committee :—

1. This defendant admits the statements and facts respectively made and alleged in paragraphs 1 to 16, both inclusive, of the plaintiff's statement of claim, but for greater certainty as to contents of the documents therein mentioned, begs to refer to the same when produced.

2. Under the settlement dated the 18th November, 1854, mentioned in the first paragraph of the said statement of claim, this defendant became entitled, on the death of her husband Martin Cullinan, which took place on the 30th day of March, 1881, to the rents and profits of the lands thereby settled, comprising the lands mentioned in the first paragraph of the said statement of claim, during her life, but this defendant has never received any of the said rents and profits, or any account of the same.

From the correspondence which was put in evidence it appeared that the defendant Patrick Cullinan was always willing, and had

Appeal.
1902.

BYRNE
v.
CULLINAN.

before the action offered, to submit to the decision of the Lord Chancellor in lunacy the question as to whether the judicial tenancy in the lands of Waterview, which he held, was a graft upon the leasehold interest in the same lands which had been put in settlement by the deed of November 18, 1854.

The effect of the orders and proceedings in the lunacy matter, which were given in evidence, appears in the pleadings, and is stated in the judgment of Lord Justice Fitz Gibbon.

At the trial the Vice-Chancellor by his order declared that the trusts of the settlement of the 18th day of November, 1854, ought to be performed and carried into execution, so far as the same remained unperformed and capable of being executed; and declared that the bequest of the estate of Tavnagh by Martin Cullinan, mentioned first in his will dated the 27th day of March, 1881, and referred to first in the 5th paragraph of the statement of claim herein, was a valid execution by the said Martin Cullinan of the powers conferred upon him in respect of the said estate by the settlement of the 31st day of March, 1874, in the 4th paragraph of the statement of claim mentioned; and declared that the bequest of the £1000 by Martin Cullinan, mentioned secondly in his said will, and also referred to secondly in the 5th paragraph of the said statement of claim, was a valid execution by the said Martin Cullinan of the powers conferred upon him in respect of same by the said settlement of the 18th day of November, 1854; and declared that the bequest to Joseph Cullinan of all else the testator should die possessed of, being the bequest mentioned thirdly by the said Martin Cullinan in his said will, and referred to thirdly in said 5th paragraph of the statement of claim, was not an effectual appointment by the said Martin Cullinan of the lands of Waterview under the powers conferred upon him in respect of the said lands by the said settlement of the 18th day of November, 1854, and that the same accordingly went in default of appointment to the persons entitled thereto in that event under the said settlement, subject to the life interest therein of the said testator's widow Elizabeth Cullinan; and subject to the foregoing declarations, the Court declared that the trusts of the will of Martin Cullinan, deceased, dated the 27th day of March,

1881, ought to be performed and carried into execution, so far as same were unperformed and capable of being executed; and the plaintiff not requiring the real and personal estate of the said Martin Cullinan, deceased, to be administered by the Court, the Court made no order in respect thereof, and declared that the interest acquired by the defendant Patrick Cullinan in the said lands of Waterview as mentioned in said pleadings was a graft upon the interests acquired under the original leases under which same were held, and that the said lands of Waterview were subject to the trusts of the said settlement of the 18th day of November, 1854; and the Court referred it to Chambers to take the following account, namely, an account of the rents and profits of the said lands of Waterview, from the 30th day of March, 1881, the date of the death of the said Martin Cullinan, and by whom received; and the Court ordered that the defendant Patrick Cullinan should pay to the plaintiff so much of her costs incurred in this action, up to and including the hearing, as have been occasioned by reason of the claim of the defendant Patrick Cullinan to be beneficial owner of the said lands of Waterview, and declared that the plaintiff was entitled to her costs incurred in the action, up to and including the hearing, exclusive of the costs hereinbefore awarded to her, out of the property subject to the trusts of the said settlement, and declared the defendant Elizabeth Cullinan entitled to her costs.

Appeal.
1902.
BYRNE
v.
CULLINAN.

From this order the defendant Patrick Cullinan appealed.

O'Connor, K.C., O'Brien, K.C., and Robert Doyle, for the appellant.

Matheson, K.C., Samuels, K.C., and Morgan Byrne, for the plaintiff.

Oulton, for Elizabeth Cullinan.

The following cases were cited:—*Andrews v. Emmott* (1);

Appeal. *Nowell v. Roake* (1); *Re Morgan* (2); *Hughes v. Turner* (3); *In re Porter's Settlement* (4). Sugden on Powers, p. 350 (8th edit.), was referred to.

BYRNE
v.
CULLINAN.

Dec. 4.

FITZ GIBBON, L.J.:—

This is an unfortunate piece of family litigation.

It is important to see what the real question was which the statement of claim was framed to raise, and to understand the circumstances under which the suit was launched. The statement of claim concludes with the prayer:—

“1. To have the trusts of the settlement of November 18, 1854, carried into execution.

“2. To have the trusts of the will of Martin Cullinan, deceased, dated March 27, 1881, carried into execution.

“3. If necessary, to have the real and personal estate of the said Martin Cullinan administered.

“4. A declaration that the interest acquired by the defendant Patrick Cullinan in the lands of Waterview is a graft upon the interests acquired under the original leases under which same were held, and that the said lands of Waterview are now subject to the trusts of the said settlement of November 18, 1854.

“5. An account of the rents and profits of the said lands of Waterview.

“6. An inquiry as to the sale or disposal and rents and profits of the lands of Mountbrown, in the barony of Clare and county of Galway.”

The only settlement the trusts of which that prayer sought to carry into execution was the settlement of 1854, and the execution of the trusts of the will of Martin Cullinan was sought in respect only of property comprised in that settlement. The will makes a complicated disposition, which includes property of the testator as well as property held on the trusts of the settlement. But the subject-matter of this litigation, in form, is the trust property only, and the execution only of such trusts of the will of 1881 as must be executed in order to carry out the trusts of the settlement of 1854.

- | | |
|--------------------------------------|--------------------|
| (1) 2 Bing. 497; 10 Moore, 113; | (3) 3 M. & K. 666. |
| 5 B. & Cr. 720; 6 Bing. 475. | (4) 45 Ch. D. 179. |
| (2) 7 Ir. C. R. 18; 8 Ir. C. R. 266. | |

The Vice-Chancellor's judgment indicates that there was no controversy before him except as to Waterview; the plaintiff disclaimed requiring any account of the real and personal estate of Martin Cullinan. The decree, however, contains two declarations—one as to the lands of Tavnagh, and the other as to a sum of £1000—which bring in the trusts of Martin Cullinan's will. The lands of Tavnagh were put in settlement by an indenture of March 31, 1874; they were in the nature of after-acquired property, and were settled upon trusts similar to those declared by the settlement of 1854. By these two settlements Waterview and Tavnagh were settled on Martin Cullinan and his wife—the lunatic defendant Elizabeth Cullinan—for successive life estates; and subject thereto, on the children of the marriage as Martin Cullinan should appoint. It has been conceded here that Mrs. Cullinan's right to Tavnagh and to the income of the £1000 for her life has never been disputed. The lunacy proceedings show this, and no question was raised by the pleadings in this suit, either as to Tavnagh or as to the £1000. Tavnagh is in the possession of the lunatic as tenant for life, with remainder, on the assumption on which the will was made, to the three daughters of Martin Cullinan and his son Christopher; the only person who can have any conflicting claim is his son Joseph, or some person or persons claiming through him; but his name does not appear at all in the litigation or in the correspondence. On the facts as they stood when the suit began, no issue was, or could have been, joined as to Tavnagh or the £1000. But the disposition of this property by the will has an important bearing on the interpretation of the disposition of Waterview, and is therefore legitimately to be considered in the suit which was instituted to try whether Waterview was well appointed by the will. Waterview was held under a lease which was surrendered, and a judicial tenancy has been substituted for it. This judicial tenancy is now vested by assignment in the defendant Patrick Cullinan, and one of the questions raised was whether the lands were not still bound by the provisions of the settlement and of the will, on the ground that the judicial tenancy was a graft upon the surrendered leasehold. In the correspondence it clearly appears that Patrick Cullinan, who was a relative of the testator, was willing, before suit, to submit any question that might arise

Appeal.
1902.

BYRNE
v.

CULLINAN.

Fitz Gibbon,
L.J.

Appeal.
1902.
BYRNE
v.
CULLINAN.
Fitz Gibbon,
L.J.

upon this subject to the decision of the Lord Chancellor in the lunacy matter, and his counsel have here offered to repeat that submission. The first interest in the property claimed by the plaintiff is the life estate of the lunatic, and therefore the most ready and effective way of obtaining a decision was either, by the consent of all parties, to submit the question to the Lord Chancellor in the lunacy matter, or to bring the action in the name of the lunatic, with the sanction of the Lord Chancellor. But the Lord Chancellor refused leave to join the lunatic as a plaintiff in this action ; and she has been made a defendant.

The question is, whether the will of Martin Cullinan, the father, operated as an appointment of Waterview under the power in the settlement of 1854. That question may be put in the simpler form—Does the will dispose of Waterview?—because, where a testator has a testamentary power of disposition over property which is not his own, and by his will disposes of that property, if the only means by which he could pass the property was by exercising the power, both equity and justice will attribute the disposition to an intention to execute the power. This is done *ut res magis valeat quam pereat*.

A limitation to this rule is indicated in an Irish case—namely, where a testator who has no ownership, but has only a power, shows affirmatively that he does not intend to exercise the power, in that case equity will not call the power in aid against the declared intention not to execute it, in order to “implement” or give effect to a disposition which is declared to be made by virtue of a non-existent ownership. But this case does not raise that point, for this will contains nothing affirmatively indicating an intention to abstain from exercising the power.

The law is summed up in Sugden on Powers, 8th ed., p. 350 (par. 15, sect. 8, chapter vii.) :—

“If the intention to pass the property can be collected, it will pass under the power, although the donee supposed that it would work by force of his interest. There is no conflict. He intends the property to pass, and thinks he has all the interest in it, whereas he really has only a power. The intention governs, and the power will support the disposition.”

Paragraph 17 explains the exception which I have mentioned :—

“It is the *intention* that in these cases governs. Therefore, where it can be inferred that the power was not meant to be exercised, the Court cannot consider it as executed. Thus, if a man having several powers over different estates, and also interests in them, should recite the power over one estate, and execute it in a formal manner, and then recite, not that he has power to appoint the other estate, but that he is seized in fee of it, and accordingly convey his interest in it by lease and release, the latter estate would be held to pass out of his interest, and not by force of his power, simply on the apparent intention not to execute the power.”

Appeal.
1902.

BYRNE
v.
CULLINAN.
Fitz Gibbon,
L.J.

But in this case there is no apparent intention not to execute the power, and the testator explains how he overlooked it. He recites :—

“Whereas, I have not by me the documents which relate to my affairs, I desire to make my will to meet all possible contingencies.”

That recital would not carry the case very far if it stood alone. But it is a significant introduction to the question whether he intended to dispose of the house in which he lived, and which he mentions in his will.

The will proceeds :—

“1st. I leave the estate of Tavnagh, if I have power so to leave it, to my three daughters and my son Christopher, share and share alike, as tenants in common, and not as joint tenants; and if that should be done by appointment, I execute this will as a deed of appointment, and seal it.

“2nd. I leave the £1000, if devise be valid of No. 1, in equal shares to my three daughters and my son Christopher, share and share alike; and if such should be done by appointment by deed, I execute this will as a deed. The £1000 I refer to are invested in the Funds.

“3rd. If Nos. 1 and 2 stand valid, I leave and bequeath all else I die possessed of, subject as herein, to my son Joseph, leaving him also whatever rights I have in the Costello property.”

He thus roughly divides all the property at his disposal into two shares, one of which he gives to four children as tenants in common, and the other he gives to one child, Joseph. And, lest he should not have power so to leave the first share to the four children, he executes his will as a deed,

Appeal. in order further to secure it to them; and, in addition, he
 1902. makes the residuary gift to Joseph conditional upon the
 BYRNE validity of the gift to the other four children. It is clear that
 v. he did not think that there was the same doubt about the mode in
 CULLINAN. which he could dispose of the other property which there was
 Fitz Gibbon, about Tavnagh and the £1000, and he did not take the "double-
 I.J. barrelled shot" by deed and will at Waterview: but this does not
 indicate any intention not to dispose of it, it only indicates that
 he thought that it was his own, and he declares that he intends his
 will "to meet all possible contingencies."

Then comes the following clause:—

"5th. If Nos. 1 and 2 shall not stand valid, by reason of the estate of Tavnagh being possibly settled on Joseph, I leave then all mentioned and dealt with in Nos. 2 and 3 to my three daughters and my son Christopher, share and share alike, save that I leave the Costello property to Joseph, and I charge this disposition, No. 5, with the payment of all my debts, funeral and testamentary expenses, save they do not attach to the Costello property."

This clause plainly indicates that he intended to divide all the property at his disposal into two shares, and if possible to give "Nos. 1 and 2" to the four children, and "No. 3" to Joseph; but if this division should be disturbed by reason of his having no power to dispose of Tavnagh, then Joseph was to change places with the other four children, except as to "the Costello property." This, even so far as I have gone, would lead me to the conclusion that he had Waterview in his mind, that it entered into the calculation of the relative value of the two shares, and, therefore, that it was included in "No. 3." This is confirmed by the declaration that his will was intended to be a complete settlement of his affairs, and to meet all possible contingencies.

But he adds an express mention of Waterview:—

"6th. In any instance my wife is to have the life use of Tavnagh, and a right to reside at Waterview for her life."

These words might possibly have been satisfied by leaving Waterview to his widow for her life under the settlement; but the next paragraph is consistent only with an intention to give an interest in it by the will itself:—

"7th. My three daughters and my son Christopher shall each have a right to reside at Waterview, each until he or she reach eighteen years."

Appeal.
1902.

BYRNE
v.

CULLINAN.

Fitz Gibbon,
L.J.

Against whom is this "right to reside at Waterview" to exist? Plainly against some person to whom Waterview is to go, subject to that right. Joseph if "Nos. 1 and 2" stood valid, and if not, the other four children were the only persons to whom it could go, and it could go either to him or to them, only as passing under the words "all else I die possessed of." Therefore, the testator intended to dispose of Waterview by his will.—*Q. E. D.*

Mr. Samuels tried to escape this conclusion by suggesting that clause 7 gave the daughters a right to reside at Waterview as against the widow; but this would reduce the will to absurdity, for the right of the children was given to each up to the age of eighteen years, and was not limited to the widow's life. She, in fact, was given by the will only a similar "right to reside" with them.

It was argued that a partial exercise of a power does not prove an intention to exercise it completely. That is true. But it is difficult to conceive an intention to give a partial estate, or a limited right, by way of appointment, out of or against a property not treated as appointed, where there is no intention to dispose of the rest of it under a universal residuary disposition contained in the same will. Here the partial estate or limited right is given against the *corpus* of the property, and seems necessarily to carry with it the intention that the *corpus*, subject thereto, shall go to some one else under the will.

The fact that the testator has charged all his assets with his debts is explained by his belief that Waterview was part of his assets, but it does not show that he intended not to dispose of it by his will.

There remains the difficulty caused by the constitution of the suit. Joseph is not a party: Patrick is made a defendant both in his personal capacity and also as a trustee of the settlement of 1854. He was appointed by a deed of August 22, 1894, under an order in the lunacy matter of June 9, 1894. This very order erroneously, but specifically, finds that Waterview was not included in the settlement of 1854, and therefore that it was not to be

Appeal.
1902.
BYRNE
v.
CULLINAN.
Fitz Gibbon,
L.J.

vested in Patrick as trustee. He was appointed merely for the purpose of vesting in him and his co-trustee £1068 19s. 6d. consols, which the deed appointing him recites to be the only property then remaining subject to the trusts of the settlement of 1854. On January 25, 1896, Patrick got Waterville conveyed to him by the sheriff under a judgment against Joseph. But Joseph had no estate in Waterview which the sheriff could convey, because his mother had a life estate in possession, and his interest was only reversionary. The parties seem to have dealt with it as if his mother's life estate had come to an end, but we cannot determine their rights, in the events which have happened, in the absence of Joseph. His rights may have passed to his creditors. We cannot make any declaration about them now without the risk of doing injustice. We can only declare, as against the plaintiff, that the will was a valid appointment of Waterview to Joseph, and then drop it. We will declare that the appointment of Tavnagh and of the £1000 has not been questioned by any of the defendants; that the widow—the lunatic defendant Elizabeth—is in possession thereof for her life, and that this suit is not conversant therewith; that the defendant Patrick is not trustee of Tavnagh; and upon his undertaking to submit to the jurisdiction of the Lord Chancellor any claim which he may have to the lands of Waterview, we will dismiss this action. This order will enable the parties to obtain what it is Patrick's interest to facilitate, namely, a decision as to his rights at the least expense.

It is true that Patrick raised the defence that he was a purchaser for value without notice of the equities attaching to Waterview. But he also rightly put his defence to this suit upon the ground that the plaintiff had "no estate or interest, legal or equitable, in the lands of Waterview," and that the plaintiff could not sustain her action upon the claim, if any, of the defendant Elizabeth. The defence of purchase for value without notice has caused no additional expense, and the plaintiff must pay to the defendants Patrick Cullinan and William Kirwan their costs of suit. As to the costs of the lunatic, we make no order. Her advisers can apply to the Lord Chancellor, telling him that the suit has failed because the lunatic was not a plaintiff; leave to bring the action in her name was refused by him—very wisely (if

I may say so)—having regard to the willingness of Patrick to submit to the jurisdiction in lunacy, and it will be for the Lord Chancellor to decide whether those who represented Elizabeth here should be indemnified at her expense against the costs which they have incurred on her behalf.

Appeal.
1902.

BYRNE
v.
CULLINAN.

WALKER, L. J. :—

The only question of substance which we have to consider is whether the lands of Waterview, over which the testator had a special power of appointment, but not any disposing power as property of his own, though he may have thought he had, passed to Joseph Cullinan under the will of his father, Martin Cullinan.

In order to determine that question in favour of the alleged appointee, it is only necessary to find an intention on the part of Martin Cullinan, the donee of the power, that the lands should pass to Joseph, and if that intention appears it will pass, though the donee of the power did not know he was exercising it, or had forgotten its existence. Efficacy to pass the property will be supplied by resorting to the only means of carrying out the intention which, in fact, existed, *i.e.* a presumed intention to exercise the power.

It appears that Martin Cullinan had a special power to dispose amongst his children of lands called Tavnagh, under a deed of 1874, and also a sum of £1000, and the lands of Waterview, under the settlement of 1854. There were five children objects of this power, three daughters and a son Christopher, and an eldest son Joseph. In addition to these properties, subject to his power, he had a power of disposition over lands called Costello, his own property, and some general personal estate. He sets out in making his will by a preamble that as he had not by him the documents relating to his affairs, he desired to make his will to meet all possible contingencies. Accordingly, he seals his will as a deed (this, in his opinion, being necessary to make it operate by appointment). Thus he evidences an intention that all he does give shall pass, whether it be by disposition or by appointment, and I think this preamble shows an intention that nothing shall be left undisposed of which could pass in either way. Well—1. He gives, and,

Appeal. if it be necessary for passing it, appoints Tavnagh to his three
 1902. daughters and Christopher. 2. He gives and appoints £1000 in
 BYRNE the same manner to the same objects. Then comes 3. "If Nos. 1
 v. CULLINAN. and 2 stand valid, I leave and bequeath all else I am possessed of,
 Walker, L.J. subject as herein, to my son Joseph, leaving him also whatever
 rights I have in the Costello property." The charge by No. 4 of
 all his debts, funeral and testamentary expenses on what, in part,
 according to the argument, is property subject to the power, is a
 neutral matter, because, by No. 5, he purports to make a similar
 charge on what, admittedly, is only a fund subject to a power. If
 Nos. 6 and 7 had not been in the will, I should have been disposed
 to yield to the argument for the plaintiff, but I think those clauses
 determine the construction of the whole will in favour of the
 appointment of Waterview to Joseph. In No. 3 the gift to Joseph
 is subject as herein, *i.e.* subject as in this will, including what is
 done by clauses 6 and 7. We look out, therefore, for conditions
 imposed, and we find such in 6 and 7. No. 6 contains a restriction
 in favour of the wife as regards one property subject to the power,
 for Tavnagh and Waterview are subject; but No. 7 is far clearer.
 "My three daughters and my son Christopher shall each have a
 right to reside at Waterview, each until he or she reach eighteen
 years, but such residential right shall cease to each who reaches
 that age." It does not mean a restriction on the wife's right in
 Waterview, for she had only, so far as the will is concerned, a right
 to reside herself. It means after her death also.

The words "shall cease" are significant. I think they should
 be coupled with the words "subject as herein," and imply a release
 when the event happens, for the benefit of the owner of Waterview,
 from the obligation of residence, and imply that Waterview was
 included in the general gift to Joseph of "all else I die possessed
 of." There was no one else but Joseph to whom it could be given.
 The words "shall cease," as regards the three daughters and
 Christopher, are quite inappropriate if their effect or result was to
 leave each of them a proprietary right to one-fifth of Waterview.
 No. 7 imports, first, a restriction on some benefit already given,
 and, secondly, a freedom from that restriction for the benefit of
 the person intended to be benefited, whenever that named period
 should arise.

I think an intention thus appears to pass Waterview, and whether that is carried out through a power, or as property, is immaterial; and in this case we find the preamble to the will stating, in effect, that he wishes his will to operate in whatever way it lawfully can, whether it be by gift or as an appointment. Walker, L.J.

Appeal.
1902.
BYRNE
v.
CULLINAN.

I concur as to the form of the order.

HOLMES, L. J. :—

Before referring to the substantial question for decision, I wish to say something about the scope and object of this action which have been made—very unnecessarily, I think—a subject of controversy by counsel for the plaintiff.

A settlement was executed in the year 1854, on the marriage of Martin Cullinan with Elizabeth Regan, by which an undivided fourth of the lands of Mountbrown, two portions of the lands of Waterview, and the sum of £500, subject to successive life estates therein given to the husband and wife, were settled for their children in such shares as the husband should by writing appoint. By a subsequent settlement in the year 1874, the lands of Tavnagh were settled on similar uses and trusts. The lands of Mountbrown were sold in the Incumbered Estates Court during Martin Cullinan's lifetime; and the proceeds of the portion thereof included in his marriage settlement, together with the £500, were invested in £1068 19s. 6d. Government Stock, now standing in the name of the defendant Patrick Cullinan, the surviving trustee. Martin Cullinan died in 1881, and three days before his death he made his will, by which he exercised his power of appointment over the lands of Tavnagh and the Government Stock in favour of his son Christopher and his three daughters, one of whom is the plaintiff, as tenants in common in equal shares. No question has ever been raised as to the validity of these appointments. Martin Cullinan's widow, who is now a lunatic under the care of the Lord Chancellor, has the income of the lands and funds applied for her benefit; and the appointees will become absolutely entitled thereto on her death. To bring an action in respect of these portions of the settled property would be a purely wanton act; and I acquit the plaintiff's advisers of any such intention.

Appel.
1902.
BYRNE
v.
CULLINAN.
Holmes, L.J.

The Waterview property, however, stands in a different position. At the date of the settlement it was held under two leases, which were subsequently surrendered by Martin Cullinan, who took in lieu thereof a new lease for a term of lives and years, which it is not disputed thereupon became subject to the trusts of the settlement, and would, after the widow's death, belong to the children of the marriage, in equal shares, if it was not otherwise appointed by Martin Cullinan. This involves a nice question of construction, to solve which this action was brought. On the death of the husband it seems to have been assumed by all parties interested that Joseph Cullinan, one of his children, took it absolutely under the residuary gift in his father's will; and he entered into possession without any regard to, or recognition of, his mother's life estate under the settlement. He subsequently got a fair rent fixed; and in 1896 his interest was seized under a writ of execution, and sold and assigned by the sheriff to Patrick Cullinan, the defendant, who in 1894 had been appointed a trustee of the marriage settlement of 1854. The plaintiff, being one of the children of Martin Cullinan, before instituting this action, called the attention of the Registrar in lunacy to the fact that the defendant Patrick Cullinan was in possession of the lands of Waterview, without accounting for the rents and profits, whereupon it was suggested by the Registrar that any controversy as to these lands might be settled by consent of the parties in the lunacy matter. To this Patrick Cullinan agreed, and as between himself and the widow it was manifestly the proper course; but the plaintiff was advised—and, in my opinion, rightly advised—that the appropriate mode of establishing her own claim was by action. Hence this suit. Although it asks formally that the trusts of the settlement of 1854 should be carried into execution, it is really only conversant with Waterview, and the foundation of the plaintiff's right to sue is that she and the other children are entitled to these lands, subject to her mother's life estate, in default of appointment by her father.

It is alleged in the defence that Martin Cullinan's will operated as an execution of the power of appointment in favour of his son Joseph: and this is the only issue on which the result of the action depends. If the plaintiff is right in this point, she

succeeds altogether; but if she is wrong, the suit must be dismissed. In these circumstances, I confess that I was not a little surprised to see the efforts made by counsel for the plaintiff to argue a matter which the Court ought not to enter upon in the present state of the record, and a decision on which, in her favour, would be fatal to the judgment appealed from. The point thus relied on is, that Joseph Cullinan's interest in Waterview, whatever it is, is not now vested in the defendant Patrick. This may be a most important question as between Patrick and Joseph, who is not a party to the suit, but as far as the plaintiff is concerned, it is wholly immaterial. If we were to rule it in her favour, there would be no *legitimus contradictor*; and the Court ought not to make any declaration as regards Waterview.

I have dealt with this contention at a length in proportion more to the pertinacity with which it has been urged than to its inherent importance; and I now turn to the true question in issue. There is, I think, no doubt as to the principles of law applicable to the case. There is abundant evidence in Martin Cullinan's will to show that the testator desired to dispose by will both of his own property and also the property over which he had a power of appointment, and thought that he was doing so; but this would not be sufficient in itself to operate as an execution of the power, unless it appears from the language of the instrument that he is disposing of the premises subject to the power to some or one of its objects. Where, however, such a disposition is apparent, it is immaterial whether the testator believed that the premises were his own, or that he had only a power to appoint then.

Applying these rules of construction to the will under consideration, I find, in clause 3, a general bequest to his son Joseph of all he died possessed of, except what is included in clauses 1 and 2. Now, as I said in the course of the argument, if there were nothing more in the will this would not operate as an execution of the power, inasmuch as it is confined in terms to his own property. To make it so operate it must appear from the will itself that he intended to include in these words the lands of Waterview. This, however, I think, is shown clearly by the following clauses, especially clause 7, which would be absurd and unintelligible if there had not been an entire disposition of the lands of Waterview

Appeal.
1902.

BYRNE
v.
CULLINAN.
Holmes, L.J.

Appeal. —a disposition to be found in clause 3. I have no doubt that the
 1902. testator believed that he was the absolute owner of these lands;
BYRNE but this is unimportant if he shows, as I believe he does show,
v. that he disposes of it in favour of his son, who was an object
CULLINAN. of the power.
Holmes, L.J.

For these reasons the appeal ought to be allowed, and, as a necessary consequence, the action dismissed.

Solicitor for the plaintiff: *J. W. Flynn.*

Solicitor for the defendants Patrick Cullinan and W. Kirwan :
William T. Sheridan.

Solicitors for the defendant Elizabeth Cullinan: *E. & G.*
Stapleton.

G. Y. D.

Ross, J. IN THE MATTER OF THE ESTATE OF THE MOST HONOUR-
 1903. ABLE JOHN HENRY, MARQUIS OF ELY, OWNER
Dec. 3, 4, 8, AND PETITIONER.
9, 14, 15, 16,
21.

*Landlord and tenant—Land Purchase Acts—Tenant for life and remainder-
 man—Percentage under 3 Edw. 7, c. 37, s. 48—Vendor.*

The percentage payable to the vendor of an estate, out of the Land Purchase Aid Fund, under sect. 48 of the Irish Land Act, 1903, where the vendor is tenant for life only or a trustee for sale, is bound by the trusts of the settlement.

Semle: The powers of sale conferred by the Settled Land Acts are supplementary to those in the Land Purchase Acts.

MOTION on behalf of the owner and petitioner having carriage for an order—(1) That it be declared that the solicitor having carriage of the sale in this matter of the hereditaments and premises comprised in and ordered to be sold by the absolute order for sale made herein, and dated the 29th of November, 1902, should, on behalf of the Marquis of Ely as vendor, be at liberty to enter into negotiations with the tenants of the holdings upon the said hereditaments and premises, and obtain from the said tenants

proposals for the sale to and purchase by the said tenants under the Irish Land Act, 1903, of the holdings of such tenants upon the hereditaments and premises comprised in the said absolute order for sale, to which the provisions of the said Act were applicable, provided that such negotiations should be carried on, and proposals obtained, upon terms of sale and prices to be approved by the said Marquis of Ely, and upon the basis, and subject to the conditions following, that is to say, that in the event of a sale being effected out of Court by him as vendor, the said Marquis of Ely as such vendor of such hereditaments and premises was entitled to be paid and to receive and retain for his own absolute use the moneys which should be paid by the Irish Land Commission pursuant to section 48 of the said Act. (2) That it be declared that the said Marquis of Ely as such vendor was, upon such sale, entitled to be paid and to receive and retain for his own absolute use the moneys which should be paid by the said Land Commission as aforesaid. (3) That all further proceedings towards a sale under the provisions of the said absolute order for sale herein might be stayed, or, if necessary, that such absolute order might be discharged upon such terms as to the Court might seem just. (4) Alternatively that the Court might make such other order or give such relief as the nature of the case might require. (5) That the costs of and incidental to this application, order therein, and proceedings thereunder, might be provided for, or, if the Court should so deem it expedient, that leave might be given to the solicitors having carriage to issue on behalf of the said Marquis of Ely an originating summons to determine the questions above mentioned.

By permission of the Court an originating summons under Order LV., R. 4, was also served on behalf of the owner, intituled "In the Matter of the Judicature Act, and of Order LV. of Rules of the Supreme Court, 1891 and 1902, and In the Matter of the Landed Estates Court Act, and In the Matter of the Trusts of an Indenture of Settlement, bearing date the 7th December, 1875, and made between the Most Hon. John Henry Wellington Graham, Marquis of Ely, of the first part; Caroline Anne Caithness, of the second part; Charles John Tottenham and John Christopher Lethbridge, of the third part; Maurice Ceely

Ross, J.
1903.

In re
ELY'S
ESTATE.

Ross, J.
1903.

In re
ELY'S
ESTATE.

Maude and Patrick Hare, of the fourth part; and Godfrey Taylor and Christopher Lethbridge, of the fifth part; and in the Matter of the Estate of the Most Noble John Henry, Marquis of Ely, owner and petitioner, pending in this honourable Court," for the determination of the following question :—Whether the said Marquis of Ely, as tenant for life under the said settlement in the title mentioned, of the lands, hereditaments, and premises comprised in the absolute order for sale made and dated the 29th of November, 1902, to which the provisions of the Irish Land Act, 1903, were applicable, was in the event of a sale out of Court by him as vendor under the provisions of the said Act, entitled to receive and retain for his own absolute use such moneys as should be paid by the Irish Land Commission out of advances by the National Debt Commissioners from the Land Purchase Aid Fund for the purpose of aiding the sales of estates under the said Act.

The following is a sufficient summary of the material facts of the case :—

John Henry Wellington Graham, Marquis of Ely, being seised in fee of certain estates in the counties of Fermanagh and Wexford, executed a settlement thereof on the 7th December, 1875, whereby he created a jointure rentcharge in favour of his intended wife, and subject thereto, limited them to such uses as he should by will or deed appoint, with remainder, after certain limitations, which have failed, to the use of John Henry, the present Marquis of Ely, for life, with remainder to his first and other sons in tail male, with divers remainders over.

At the time of the execution of the settlement the estates were subject to certain mortgages, and subsequently he raised further sums from the Royal Exchange Assurance Corporation under the power of appointment contained in the settlement.

By his will, dated 3rd July, 1884, and two codicils, in exercise of his general power of appointment, he charged the estates with certain rentcharges, and he created a term of 200 years to secure the same, and then devised his estates to Charles Robert Worsley Tottenham and Christopher Lethbridge, for a term of 1000 years, and subject thereto, granted the same to the uses, upon the trusts, and subject to the powers, provisions, and declarations in the settlement of the 7th December, 1875. By his will he also gave large

pecuniary legacies. The following were the trusts of the term of 1000 years:—In the first place by mortgage or by sale of timber, or out of the rents or profits, to raise any sum that the trustees might consider expedient for the payment of incumbrances on the estate existing at his death which, but for the trusts of the term of 1000 years, would be payable out of his other real estate, or out of his personal estate, to the exoneration of such real and personal estate; and also such sum as it might be necessary to raise for his funeral and testamentary expenses, debts and legacies.

Ross, J.
1903.

In re
ELY'S
ESTATE.

The testator died on the 3rd April, 1889, and as it was found impossible to raise any further sums upon the settled estates, in order to carry out the trust of the term of 1000 years and to pay the funeral and testamentary expenses and legacies bequeathed by his will, an action was commenced in the High Court of Justice in England for the administration of his estate, and on the 5th November, 1889, an order was made for the administration thereof and appointing Maurice Ceely Maude receiver over the county Fermanagh estates, comprised in the term of 1000 years, and Godfrey Lovelace Taylor receiver over the county Wexford estates, comprised in the same term. The several charges and incumbrances secured by the term of 1000 years were all paid off, with the exception of a sum of £5146.

Ronan, K.C. (with him *O'Brien, K.C.*, and *Littleddale*), for the Marquis of Ely:—

The Court has now jurisdiction to entertain a suit to declare rights: see Order XXV., Rule 5, Order LV., Rule 4, of the Rules of 1891, and Order LV. of the Rules of November 18, 1902; *Attorney-General v. Merthyr Tydvil Union* (1); *Islington Vestry v. Hornsby U. D. C.* (2); *Llandudno U. D. C. v. Woods* (3); *Young v. Ashley Gardens Properties Limited* (4); and it will be necessary to adjudicate on the question as to the bonus before arriving at any conclusion as to whether the motion should be granted. We submit that the Marquis of Ely is entitled to the percentage under section 48 of the Irish Land Act, 1903, usually called the bonus, payable to the vendor, if the estate is sold out of

(1) [1900] 1 Ch. 516.

(2) *Ibid.* 695.

(3) [1899] 2 Ch. 705.

(4) [1903] 2 Ch. 112.

Ross, J.
1903.

In re
ELY'S
ESTATE.

Court, as we propose. It is different from every other money as to which questions between tenant for life and remainderman arise. (1.) It is in the nature of a free gift; (2.) it is not bound by any antecedent equity; and (3.) it is not calculated on the value of the actual net estate sold, but on the gross sum realized before the payment of the redemption price of the superior interests. It was a general principle of equity that a tenant for life should not obtain a benefit at the expense of the inheritance, but there is nothing to prevent the Legislature legalizing it; and if the statute says the tenant for life is to get it, this will be given effect to. Even when a decision on a statute has been considered as part of the law of the land, it will be reversed if it is erroneous: see *In re M'Naul's Estate* (1), overruling *Billing v. Welch* (2), which was decided in 1871. "Paid to the vendor" in section 48 is in contradistinction to "added to the purchase-money" in the same section, and means that it is not to be added to the purchase-money, but paid to the vendor beneficially. If the trustees are right in their contention that it forms portion of the trust estate, the anomalous result would be that proceedings would in every case have to be taken by the trustees of a settlement against the vendor tenant for life, to have it declared portion of the trust funds, a thing which the Legislature cannot be said to have contemplated. Again, there is no provision in the Act for the distribution of the bonus, save in the case of a sale here, when it is to be added to the purchase-money, though there is for the distribution of the purchase-money (the bonus is to be *paid* and the purchase-money *distributed*), and the distinction between the two is kept up throughout. The existence of the absolute order for sale does not take away the right of the vendor to the bonus in case the sale was carried out outside the Court. The bonus was given to aid that sale, and it could not be said that the remainderman, who did nothing, aided the sale. In the case of sales here it is to be added to the purchase-money, because there is no necessity of offering any inducement to the owner to sell.

A vendor selling under the Land Purchase Acts sells under the provisions of those Acts, and not under the Settled Land Acts,

(1) [1902] 1 I. R. 114.

(2) I. R. 6 C. L. 88.

as the powers under the Land Purchase Acts are wider ; consequently, section 53 of the Settled Land Act does not apply to wholly different powers of sale vested in a tenant for life under the Land Purchase Acts, under which he can sell the fee, though the actual estate owned is a lesser estate : and the produce of the sale of the fee could not be said to be capital money arising under the Act.

Up to the passing of the Settled Land Act, 1882, sales to tenants were carried out under the power conferred by section 33 of the Landlord and Tenant Act, 1870 ; from 1882 till 1885 they were carried out under that section as well as under the newly created procedure of the Settled Land Act, 1882 ; after the passing of the Purchase of Land (Ireland) Act, 1885, sales were carried out under the latter Act, and not under the Settled Land Act, 1882. This Act of 1885 gives a tenant for life a new special power, defined partly by reference to the Settled Land Act, and the purchase-money is to be dealt with *as if it were* capital money arising under the Settled Land Act, or purchase-money otherwise payable under the Act of 1885 (section 6).

Again, section 14 of the Land Law (Ireland) Act, 1887, shows that the purchase-money was not necessarily capital money arising under the Settled Land Act, 1882. Again, the distinction is kept up in the Act of 1896 ; see the definition of limited owner in section 48.

The test of right to the bonus in cases within the Court is solvency as to capital ; in cases outside the Court, solvency as to income ; in the latter case there would be a bonus, and so the Court, in exercising its discretion, should exercise it so that the bonus may be made available for the incumbrancers, which the vendor here undertakes to do.

The case of a trustee for sale was not contemplated by the section ; but he is mentioned in section 23 of the Act of 1887, which is incorporated ; he would be a vendor within sub-section 1, and not within clause 2. As to the appointment of receivers by Mr. Justice Kekewich, in the Chancery action in England, they were only over the term of 1000 years, and not over the estate, and so the case would not come within sect. 40 ; besides, they, not having been appointed by this Court, are not receivers within the section :

Ross, J.
1903.

In re
ELY'S
ESTATE.

Ross, J. *Ferguson v. Mahon* (1). The object of granting a stay is to sell to the tenants, which is the policy of the Act. [Counsel cited *In re Owen's Estate* (2); *In re White's Estate* (3); *In re Bunbury's Estate* (4); *In re Buswell's Estate* (5).]

Matheson, K.C. (with him *Wakely, K.C., J. H. Shaw, and W. M. Crozier*), for the trustees of the settlement :—

We submit that the hypothetical question raised in the summons cannot be considered, and that the cases cited do not bear out this application; the actual question at issue was raisable and raised in those cases, some of which were actions claiming injunctions: here the question is merely hypothetical.

We represent the trustees, who are trustees for all persons under the settlement, and who claim that the sales should be had here where the bonus would be added to the purchase-money and be held by them in trust for all the beneficiaries.

This is a Court of Equity: the tenant for life has no greater equity in this Court than the remainderman. If the argument on the other side is right, the words in sect. 48 (1), for the purpose of "aiding the sale," ought to be read as "aiding the tenant for life"; the aiding is not to be by stimulating the person who can sell, but by bridging over the gap between what the tenant can give and what the landlord can accept, which gap remains, whether the estate is settled or not.

The trustees can only get this under the settlement, by virtue of which both the tenant for life and the trustees get it; and they both get it as trustees for the inheritance.

Sales to tenants are carried out, in the case of vendors who are not absolute owners, under the Settled Land Acts, and the duty of the tenant for life selling is clearly stated in sect. 53 of the Settled Land Act, 1882, which provides that he shall "have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position, and have the duties and liabilities, of a trustee for those

(1) 11 A. & E. 179.

(2) [1897] 1 I. R. 193, 200.

(3) 3 Ir. W. L. R. 171.

(4) [1901] 1 I. R. 248.

(5) 5 L. R. Ir. 349.

parties." Capital money is not referred to in that section. Once a fiduciary relationship is established, the vendor tenant for life is trustee for the remainderman: *In re Biss*; *Biss v. Biss* (1); *Pole v. Pole* (2); *Yem v. Edwards* (3); and the cases cited in *Keech v. Sandford* (4); Lewin on Trusts (10th ed.), p. 193.

Ross, J.
1903.

In re
ELY's
ESTATE.

It cannot be said that the proviso in sect. 48 (1) was intended to alter rights: we submit it only deals with procedure.

The power of a tenant for life to sell has, since the passing of the Settled Land Act, 1882, been derived from that Act. The Act of 1885 was passed, as appears by sect. 2, to enable tenants to purchase their holdings either from the Land Commission or from the landlords of such holdings; so the power in the landlords to sell was the existing power under the Settled Land Act, 1882. Then who are landlords who can sell to the tenants? See the Landlord and Tenant Act, 1870, section 33; Land Law (Ireland) Act, 1881, section 57; Purchase of Land (Ireland) Act, 1885, sections 5, 6; Land Law (Ireland) Act, 1887, sect. 34; Purchase of Land (Ireland) Act, 1891, section 14; under which various persons are brought into the category of landlords who can sell. The powers in the Acts of 1870, sect. 33, and 1881, sect. 25, are in abeyance. Section 5 of the Act of 1885 is confined to sales to the Land Commission, and the mode of sale is peculiar, not being within the powers of a tenant for life under the Settled Land Act, 1882, otherwise the provisions in the section would be unnecessary; in other words, this and sect. 7 show that the powers under the Settled Land Act are enlarged. [Counsel referred in detail to section 13 of the Act of 1885, sections 14, 15, 16, and 23 of the Act of 1887, to show that the powers of sale exercised were under the Settled Land Act, and that no new power of sale was given by the Act of 1887; and also to sects. 18 and 19 of the Act of 1891.] Up to the passing of the Act of 1896 when a limited owner was selling, which he did under the Settled Land Acts, all he could sell was the settled land; but by that Act superior interests are directed to be redeemed (section 31); it will be noticed that that section commences with the words "where any land *has* been sold"; that is, the limited owner sells the interest he

(1) [1903] 2 Ch. 40.

(2) 2 Dr. & Sm. 420.

(3) 3 K. & J. 564.

(4) 2 White & Tudor (7th ed.), 693.

Ross, J.
1903.

In re
ELY'S
ESTATE.

has in the land, and the Legislature attaches to the sale the incidence of the redemption of the superior interests. This Act does not confer any new power of sale, but adopts a new procedure.

Section 1 of the Act of 1903 deals with the purchase and re-sale of estates; and sect. 98 defines an estate in Part I. of the Act as "any lands which the Estates Commissioners may declare fit to be regarded as a separate estate for the purposes of this Act." The word "estate" occurred in the previous Acts, and the definition of it is given in sect. 57 of the Act of 1881 as "any lands which the Land Commission may by order declare fit to be purchased as a separate estate for the purposes of this Act." Contrast these definitions. In one case it is an estate purchased by the Land Commission; in the other, it is lands declared fit to be regarded as a separate estate.

Take sect. 17 of the Act of 1903. In sub-sect. 2 the words "purposes aforesaid" mean every purpose except distribution of purchase-money or payment of the bonus; that shows that the two are put on the same basis. It is not necessary for the purpose of sale that there should be trustees for the purposes of the Settled Land Acts; but when the purchase-money and bonus come to be dealt with, the trustees must be recognized, and if there are none, such must be appointed.

If Mr. Ronan's argument is right, in 17 (2) the words "for all purposes other than the distribution of the purchase-money" should be substituted for the words "for the purposes aforesaid." So in case of settled estates there must be trustees to receive the bonus.

Section 63 shows that when the Legislature intends something which will do violence to equity it says so expressly. Section 3 gives little benefit. If a tenant for life sells his demesne to the Land Commission, the purchase-money goes to his trustees. He may buy it back if he can find the money; but he gets very little. Section 12 of the Settled Land Act, 1890, gives a tenant for life the right to purchase for his own use.

The question of the disparity between the value of the settled land and the purchase-money of the fee on which the bonus is payable is important: can it be said that the tenant for life alone gets this?

Wakely, K.C.:—

If this motion is granted it will depend in each case in this Court on the procedure adopted whether the tenant for life gets the bonus or not. This is not a motion to stay proceedings so as to pay off the incumbrancers and take the estate out of Court. This is a motion to stay so as to give the bonus to the tenant for life, and no precedent could be cited for it. We submit that the remaindermen have a larger interest in the estate. Under the well-known principles of equity tenants for life are only trustees for all the persons interested in the settlement: *Holt v. Holt* (1); *Taster v. Marriott* (2); *Pickering v. Vowles* (3); *Owen v. Williams* (4); *Phillips v. Phillips* (5); *Trumper v. Trumper* (6); *Mill v. Hill* (7); *James v. Dean* (8); *In Re Hodgins* (9); *Cooper v. Phibbs* (10); *Shrewsbury v. North Staffordshire Railway Co.* (11); *Brandon v. Brandon* (12); *In re Ezekiel Barton's Trusts* (13); *Bouch v. Sproule* (14).

If Mr. Ronan's argument is sound, the bonus would not be payable in the cases of sale by the following vendors, *i.e.* trustees with a power of sale; trustees for sale; executors and administrators; trustees for charities, and collegiate persons, and corporations; a tenant for life who had assigned his estate; trustees of minor; and the committee of a lunatic; and yet from the Act of 1870 onwards each one of these persons has been defined to be a vendor for the purpose of the Land Purchase Acts. [Counsel referred to various sections of the Land Purchase Acts for these definitions, and also referred to *Bunbury's Estate* (15); *White's Estate* (16); *Finnegan's Estate* (17); *In re College of Physicians* (18).]

Ross, J.
1903.

In re
ELX'S
ESTATE.

(1) 1 Ch. Cas. 190.

(2) Amb. 668.

(3) 1 Brown's C. C. 198.

(4) Amb. 734.

(5) 29 Ch. D. 673.

(6) L. R. 8 Ch. 870.

(7) 3 H. L. Cas. 828.

(8) 11 Ves. 383.

(9) 11 Ir. Eq. R. 99.

(10) L. R. 2 H. L. 149.

(11) L. R. 1 Eq. 593.

(12) 4 Ves. 800.

(13) L. R. 5 Eq. 238.

(14) 12 A. C. 385.

(15) [1901] 1 I. R. 248.

(16) 3 Ir. W. L. R. 171.

(17) Mac Carthy's Land Cases, 29.

(18) 32 L. R. Ir. 341.

Ross, J. 1903. *Jellett, K.C.*, for the receiver over the County Fermanagh lands.

In re ELY'S ESTATE. *S. L. Brown, K.C.*, and *Cecil Atkinson*, for the receiver over the County Wexford lands.

Leech, for the Royal Exchange Insurance Company :—

We are mortgagees, and object to the motion being granted, as if the sale is had in Court the bonus will be added to the purchase-money, and will form a fund to pay us. The absolute order for sale enures for our benefit, and when it is made there are only two courses open, either to sell in Court, or to dismiss the petition: there is no intermediate course. As to the effect of an absolute order for sale, see *Re Welch* (1); *Grier's Estate* (2).

We agree that after the passing of the Settled Land Act, 1882, sales by limited owners were carried out only under that statute. The Settled Land Acts are mentioned in section 17 (2) of the Act of 1903, obviously because the sales are carried out under them, and the reference to the trustees in that sub-section shows that the purchase-money and bonus would not go to the tenant for life beneficially. The tenant for life on selling is bound to consider the interest of those who come after him. See Lord Esher's remarks on page 416, in *Re Radnor's Trusts* (3). Even apart from the Settled Land Act, the tenant for life has been held to be in a fiduciary position as regards the estate: *Hill v. Brown* (4), and the judgment of Lord St. Leonards. The bonus represents portion of the value of the land. The giving of it was intended to enable landlords to sell to their tenants at a lower price than otherwise; *i.e.* a lower price than the value of the lands: therefore if it be retained by the tenant for life for his own use, the remainderman will be defrauded. Can it be said that the Act was intended to legalise a fraud on the remainderman?

"Pay to the vendor," in section 48 (1), means pay to him as trustee, in the case of a limited owner; and, without proof that he would use the money improperly, the Court could not require

(1) 5 I. L. T. R. 140.

(3) 45 Ch. D. 402.

(2) I. R. 6 Eq. 1, at pp. 13, 15.;
L. R. 5 H. L. 688.

(4) Dru. Ch. R. temp. Sugden,
426.

the money to be paid to trustees. Again, section 3 (4) recognizes the tenant for life as being a trustee for all parties; and even if that section is put in force, the lands continue to be vested in the tenant for life, and are not to be re-vested in the trustees. The bonus is payable out of the Land Purchase Aid Fund, which is portion of the Irish Land Purchase Fund; and the latter was not intended as a bribe to the tenant for life. The argument of Mr. Ronan resolves itself into a dilemma: either a trustee for sale is excluded from being a vendor, or, if not, he takes the bonus beneficially. But vendor means any person who can sell.

Section 24 (8) provides for the payment of one year's arrears of rent out of the purchase-money to be paid to the person who would have been entitled to receive the arrears "for his own use." The same words are in section 48 (1); but they are not added after the words "pay to the vendor."

O'Brien, K.C., in reply :—

The owner is prepared to pay off the balance of £5146, and to go into receipt of the rents and profits. We say that the granting of this motion is not a matter of procedure, but of right. We deny that when a tenant for life sells, he does it under the Settled Land Acts. Taking the Land Purchase Acts, section 26 of the Landlord and Tenant Act, 1870, defines a limited owner, and section 33, restricts sales to those by an absolute owner or tenant for life or other limited owner mentioned in the section; and the purchase-money was distributed by the Landed Estates Court (sects. 32, 37). But the Landlord and Tenant (Ireland) Amendment Act, 1872, provided for the sale through the Board of Works also. Then the Land Law (Ireland) Act, 1881, passed, by which sales through the Board of Works were stopped, the procedure being through the Land Commission under the Lands Clauses Acts (sections 25, 29). The Land Commission thus got the powers of the Landed Estates Court, and the Board of Works, and the Chancery jurisdiction under the Lands Clauses Acts.

On the passing of the Settled Land Act, 1882, the powers conferred by that Act became cumulative; but up to 1896, the sale did not include the dealing with superior interests. Such a

Ross, J.
1903.

In re
ELY'S
ESTATE.

Ross, J.
1903.

In re
ELY'S
ESTATE.

sale could not be carried out under the Settled Land Act. The first reference to trustees is to be found in section 3 of the Purchase of Land (Ireland) Act, 1885; but the produce of the sale is not called capital money, but purchase-money, though the Settled Land Act had then passed, with its definition of capital money, which must be capital money arising under the Act. Section 4 of the Act of 1885 shows that the advances were under the Act of 1870. Section 5 of the Act of 1885 provides for the investment of the purchase-money in the case of settled land as if it were capital money arising under the said Act; showing that the framers of the section knew of the existence of the powers under the Land Purchase Acts, and that the powers under the Settled Land Act were cumulative. The distinction is still kept up in section 10 of the Land Law (Ireland) Act, 1887. Section 14 of that Act also shows that the distinction is kept up, for if the purchase-money were capital money under the Settled Land Act, it would not have been necessary to enact that it might be dealt with as capital money. The distinction is still kept up in sections 18 and 19 of the Act of 1891. Again, the definition of landlord in section 34 of that Act refers to section 33 of the Act of 1870.

A new provision was introduced by section 31 of the Act of 1896, by which superior interests were directed to be compulsorily redeemed. The purchase-money does not represent the purchase-money of the settled estate, but of the fee, a thing which could not be sold under the Settled Land Act; and sub-section 6 contains the first reference to a tenant for life under the Settled Land Acts. The tenant for life does not convey: that is done by the Land Commission. A tenant for life differs from a trustee. See *Warwicker v. Bretnall* (1), where fire insurance moneys were paid to the tenant in tail and not retained for the benefit of the remainderman. The question which arises in the cases cited as between tenant for life and remainderman is, is the money capital or income? The question of graft has been recently raised in *Dempsey v. Ward* (2), the case of an expired lease. In *Yem v. Edwards* (3), which was not really a case of accretion, the Act of

(1) 23 Ch. D. 188.

(2) [1899] 1 I. R. 463.

(3) 3 K. & J. 564.

Parliament was silent as to the person entitled; here the Act of Parliament says, "pay to the vendor."

Ross, J.
1903.

The opposition of the mortgagees here should not be held to disentitle the owner to have the motion granted. If the estate is solvent the mortgagees are not interested in the bonus; if the estate is insolvent no bonus will be payable, whether the estate is in Court or out of Court. In the former case because the section says so; in the latter, because it is not payable, even though the estate be taken out of Court, if an absolute order has been made, the estate being insolvent. Section 16 (1) of the Act of 1903 provides for the transfer of the claims of incumbrancers from the land to the purchase-money, not to the bonus. It is clear from *In re Owen's Estate* (1) that the Lord Chief Justice considered this Court had power to stay proceedings.

In re
ELY'S
ESTATE.

Ross, J. :—

It must be clear to every lawyer that difficulties of the most serious character arise in the construction of the 48th section of the Irish Land Act of 1903. I am the last in the world to blame the draftsman. Lord St. Leonards has said (*O'Flaherty v. M'Dowell* (2)), "We ought to make great allowance for the framers of Acts of Parliament in these days; nothing is so easy as to pull them to pieces; nothing is so difficult as to construct them properly." That language was used in 1857. We can well imagine how much more strongly the great lawyer would have expressed himself if it had been his duty to construe some of the later Land Purchase Acts. The draftsman must constantly keep before his mind the definitions in the Land Law Acts, the definitions in the Land Purchase Acts, the various sections in both codes which give a particular meaning to a particular word or phrase, and the numerous judicial decisions. When we remember the difficulty of passing the Bill, when drafted, through the two Houses, and the necessity of continually re-shaping it in consequence of amendments, it is nothing short of amazing that we can ever get, from such a factory, a machine that will work at all.

Dec. 21.

Ross, J.
1903.

in re
ELY'S
ESTATE.

When I first considered the section, I formed a very decided opinion as to its meaning. Having for several days had the pleasure of hearing a most admirable argument, I have changed my view, and have arrived at the very opposite conclusion.

The facts of the case, in so far as they affect the question now before me, are few and simple.

The Marquis of Ely is possessed of two estates as tenant for life under a settlement, one in Wexford and one in Fermanagh. A decree for the administration of the personal estate of the late Marquis of Ely has been made in England by the Honourable Mr. Justice Kekewich. It appeared in that suit that a trust term of 1000 years had been created by the late Marquis for the purpose of raising sufficient moneys out of the real estate to pay off certain debts and legacies, amounting in all to £26,000 or thereabouts, in exoneration of the personal estate. The debts and legacies having been paid out of the personal estate in the first instance, Mr. Justice Kekewich appointed a receiver over the Wexford estate and another over the Fermanagh estate. The entire rents and profits of the last few years have been applied in recouping the personal estate, and a sum of £3000 or £4000 more will be required. The present Marquis consequently is not in receipt of any part of the rents and profits of either estate. Superior to the trust term there is a charge of about £80,000 belonging to the Royal Exchange Assurance Corporation. The rental of the estate is about £16,000 per annum. In 1902 the present Marquis presented his petition to this Court in the ordinary way, and an absolute order for sale was made.

The matter comes before me, first, on a summons for the determination by me as a Judge of the Chancery Division of a question which shortly put is as follows:—"Whether in the event of a sale by the owner as vendor under the Act of 1903 out of Court, he is entitled for his own use to such moneys as may be paid to him out of the Land Purchase Aid Fund." For the sake of brevity, I shall, in what I have afterwards to say, adopt the name commonly applied to this percentage, and call it "the bonus."

The question is hypothetical, and I doubt very much whether I should be justified in formally answering it at all. The matter is not of importance, as my decision on the motion I am about to

mention will supply an answer to the question. This is a motion to stay the proceedings in this Court, in order to enable the Marquis to sell his estate through the Land Commission on terms to be approved of by me, and in this way to secure the bonus for his own use and benefit. The trustees of the settlement, in the interest of the remainderman, strongly oppose this action. If the sale goes on, in this Court, in the ordinary way, the bonus must be added to the purchase-money. As they are owners of the trust term of 1000 years, they are incumbrancers themselves within the 1st section of the Landed Estates Court Act. Further, the Royal Exchange Assurance Company refuse to consent to the estate being dealt with in the manner suggested by the motion.

The trustees contend that as the absolute order enures for the benefit of all the incumbrancers, this Court cannot, and if it could, ought not, to stay its order against the will of the incumbrancers, particularly when the rights of the parties entitled to the bonus depend upon the procedure adopted. They are, however, bound to admit that if all the incumbrancers were paid off the Marquis could take the estate out of Court. He could then sell it in his own way, and could thus secure the bonus if he is lawfully entitled to retain it. I do not think these contentions, though at present important, and perhaps fatal to the success of the motion, will ultimately affect the situation. Having regard to the value of the estate, the difficulty of getting it out of Court is surely not insuperable.

The next contention raises a question of vital importance, not merely to the parties now before me, but to all persons interested in settled estates in Ireland. The trustees insist that even if the order is stayed, and the Marquis allowed to sell through the Land Commission, the bonus when it reaches his hands would be affected by the trusts of the settlement, and that the money would be applied in the same way as if the sale in this Court were allowed to proceed. That question I now propose to decide.

In the first place, what is the bonus? It is mentioned in three sections of the Act, sections 47, 48, and 17. It is a sum calculated at the rate of 12 per cent. on the amount of purchase-money advanced under the Land Purchase Acts. The value of

Ross, J.
1903.

In re
ELY'S
ESTATE.

Ross, J
1903.

In re
ELY'S
ESTATE.

the particular estate of the vendor is not the unit on which the percentage is calculated. It is on the gross sum realized by the conversion of the fee-simple into money. It comes out of the Land Purchase Aid Fund, which is part of the Irish Land Purchase Fund. Subject to certain exceptions, it must be paid to the vendor. Its object is to aid the sale of estates. It is not to be paid in the case of an insolvent estate sold by the Land Judge, or in the case of an insolvent estate in respect of which an absolute order for sale by the Land Judge was in force at the date of the passing of the Act, or in case of any estate sold by a mortgagee in possession.

It is provided that in a case where the vendor is prevented by his incumbrances from being entitled to receive any part of the rents and profits for his own use, or where the percentage is payable in respect of an estate sold by the Land Judge "the percentage shall be added to the purchase-money and shall not be paid to the vendor." The 17th section provides that certain persons may be dealt with as owners for all purposes other than the distribution of the purchase-money and the payment of the bonus. These, I believe, are the only provisions in the Act dealing with the subject.

It is quite clear from numerous sections that the purchase-money is distinct from the bonus. In certain cases only it is expressly directed to be added to the purchase-money, and not to be paid to the vendor; in all other cases it is treated as having an independent existence.

We must now come to close quarters with section 48, subsect. 1. What is the meaning of the expression "the Land Commission may pay to the vendor"? It means that the percentage must actually reach the hands of the vendor, whether he is to hold it for himself and others, or whether he is to keep it for himself alone.

But who is the vendor? We turn to the Land Purchase Acts, and find the following may be vendors:—Absolute owners; trustees for sale; trustees with a power of sale; any body corporate; trustees for collegiate or other public purposes; limited owners as defined by section 26 of the Act of 1870; persons having the

powers of tenants for life under the Settled Land Acts; lunatics, under an order of the Lord Chancellor, and others.

Ross, J.
1903.

This long list of vendors we must assume to have been before the mind of the Legislature. Mr. Ronan and Mr. O'Brien argued that the case of trustees for sale could not have been before the minds of the framers of the section; they enlarged on the almost insurmountable difficulties which would arise in ascertaining what was to become of the bonus when paid to a trustee for sale in the case of certain estates under certain circumstances. I admit the difficulty; but no question to a Court of Justice is insoluble. There is no sufficient reason in this argument to drive me to the extreme conclusion that the word "vendor" is to be limited in the way suggested. I am therefore of opinion that "vendor" includes all classes of persons or bodies corporate who can sell under the Land Purchase Acts, and includes trustees, express or constructive.

In re
ELY's
ESTATE.

I now come to the proviso in section 48, sub-sect. 1. Although the inferences to be drawn from the language used are very doubtful, the meaning of the proviso as regards the two cases with which it deals is quite clear. The first clause of the proviso deals with a case where an estate is insolvent as to income, *i.e.* where the vendor is not in receipt of any part of the rents for his own use. The second deals with the case of an estate actually sold by the Land Judge. In either case the percentage is to be added to the purchase-money, and shall not be paid to the vendor. On behalf of Lord Ely it is insisted that in cases where it is not added to the purchase-money it is to be paid to the vendor for his own use. I quite appreciate the effect of the omission of the words "for his own use" and of their insertion elsewhere; but it is not a conclusive argument. If I am right in holding that vendor in the earlier part of the section includes trustees, I cannot, except I am coerced by the context, hold that vendor at the end of the proviso can only mean vendor beneficially entitled.

I give full weight to the argument that there are two things contrasted, *i.e.* a case where the percentage is to be added to the purchase-money and a case where it is not: that if it is to be paid to the vendor as a trustee on the trusts of the settlement there is no real contrast. The clause, however, directs the bonus in every

Ross, J.
1903.

In re
ELR'S
ESTATE.

case to be paid to the vendor; the proviso excepts two cases, and prevents the money in these cases from reaching the hand of the vendor in any capacity.

I cannot pretend fully to understand the reasons of the Legislature for dealing with the matter in this way. But these reasons are not unintelligible. They do not involve such an absurdity as to coerce a Court to hold that the money in the hands of the vendor must go to him for his own use in every case.

I shall now assume that Lord Ely has satisfied the trusts of the term, as I have no doubt he could easily do, and has received the bonus. Does he hold it for his own use, or does he hold it as trustee for himself and the other persons interested in the settlement? It has been contended on behalf of the trustees that if he sells, it must be under the powers of the Settled Land Act. It has been contended, on the other hand, that the powers of sale in the Settled Land Act are merely supplementary to the powers of sale in the Land Purchase Acts. With this latter contention I am disposed to agree. The importance of the point is that under section 53 of the Settled Land Act the tenant for life in relation to the powers under the Act is to be deemed to be in the position of, and to have the powers and liabilities of, a trustee for the parties entitled under the settlement. If this section applies, the tenant for life is in the position of an express trustee. I shall assume that it does not apply. What is the position of the tenant for life in relation to the settlement? He is not primarily a trustee; but then he is very far from being a stranger to the settlement. For the time being he represents the estate; equity imposes on him certain duties in respect of it. He is not debarred from sometimes acquiring a benefit through the estate, and retaining it for his own use, but it must be acquired at his own expense.

For example, he may voluntarily insure the premises, and if they are burnt down, he may retain the insurance moneys: *Warwick v. Bretnall* (1).

But one thing he cannot do, and it is this: he cannot traffic at the expense or even at the risk of the estate, and retain the

benefit that he has acquired for himself alone. It seems that if he buys a mortgage affecting the inheritance at a less sum than is really due upon it, he will not be permitted to realize as against the inheritance the whole amount originally secured: *Hill v. Brown* (1).

Ross, J.
1903.

In re
ELY'S
ESTATE.

How far his position is fiduciary depends on the nature of the transaction in which he is engaged and the surrounding circumstances.

It is contended for the Marquis that the bonus is a gift from the gods, and comes to the tenant for life as a *persona designata*. I cannot agree. It comes to the tenant for life because he sells. It comes to him because he sells so much land as the Estates Commissioners may declare fit to be regarded as a separate estate. It is impossible to deny that the bonus affects the price. The tenant buys at a lower price because the vendor gets the bonus. The estate loses, or is exposed to the risk of loss, in order that the man whose duty it is to represent it and defend it may take a benefit.

An argument on behalf of the Marquis was put forward, founded on section 3, sub-section 4, where in case of the re-purchase of the demesne an application can be made by persons entitled in remainder or reversion that the land so re-sold shall devolve according to the terms of the settlement. The inference is that in the absence of a declaration from the Judicial Commissioner the demesne so re-purchased would be the absolute property of the tenant for life. This, it is contended, is a by-product of the sale, and yet it goes to the tenant for life beneficially. A little consideration is only required to show that the two cases are wholly different. The tenant for life first sells the demesne to the Land Commissioners, who pay the purchase-money to trustees. The tenant for life must buy the demesne back from them partly with his own money and partly by means of an advance made to him by the Land Commission. It may not be a benefit to the settlement at all. Credit must be given for the money paid by the tenant for life himself if it is to be made subject to the trusts of the settlement.

(1) *Dru. Rep. tempore Sugden*, 426.

Ross, J.
1903.

In re
ELY'S
ESTATE.

This throws no light on a case where the advantage in the shape of money is altogether for the benefit of the tenant for life, and entails no possibility of any loss or liability whatever.

With respect to the bonus, I am now of opinion, having regard to its nature and the circumstances under which it is acquired, that a Court of Equity ought not to allow the tenant for life to appropriate this by-product of the sale to his own use. It must fasten a trust upon it in his hands, and compel him to hold it for all other parties who take under the settlement as well as for himself.

I wish it to be understood that what I have said has nothing to do with the ethics of the question. My duty is simply to interpret the Act, to declare what is the law, according to the settled principles.

I am far from thinking that the question is not full of doubt and difficulty.

It is open to the Legislature to remove these doubts and difficulties. It may by clear words declare its intention that the tenant for life is to receive this bonus for his own use. It may be quite impossible to make the Act work efficiently without such a provision. I have no right to make any suggestion, and I make no suggestion whatever. But, in my opinion, the present Act does not contain words that can be legitimately interpreted to have this effect.

To the "man in the street," a personage always appealed to in legal arguments, it must appear bewildering that the well-known intention of both Houses of the Legislature should be frustrated. But it must be understood that a Court of Justice can only decide on the intentions of the Legislature by the language used in the statute itself. Any deviation from this rule under any circumstances would be attended with disastrous consequences.

The result of the whole matter is, that I refuse the motion, on the ground that the bonus when received by the owner in this matter would be subject to the trusts of the settlement.

As to costs, the trustees being wholly right, in my opinion, are entitled to their costs out of the estate. The costs of the Assurance Company will be added to their demand.

As the matter is one of extreme difficulty and doubt, I shall declare the Marquis entitled to his costs out of the estate, but subject to the payment of the charges and costs above mentioned.

Ross, J.
1903.

In re
ELY'S
ESTATE.

All these costs are to be taxed as costs in a Chancery action.

Solicitors for the Marquis of Ely : *Messrs. Scallan & Company.*

Solicitors for the trustees : *Messrs. Crozier & Son.*

Solicitors for Mr. Maude : *Messrs. Irvine & Company.*

Solicitor for Mr. Taylor : *Mr. E. White.*

Solicitors for the Royal Exchange Assurance Company : *Messrs. Anderson & Bland.*

W. C. S.

STEWART v. O'NEILL (1).

Appeal.
1903.

Loan Fund Society—Debentures—Winding-up—Payment of—Priority—
Payment pari passu.

Oct. 28, 30.
Nov. 20.

Debentures issued by a Loan Fund Society, established under 6 & 7 Vict. c. 91, are, in the event of the Society being wound up, payable *pari passu*, and are not entitled to rank in priority of their respective dates of issue.

THE proceedings in this matter were commenced by summons issued by Leah Stewart, a debenture-holder for £100 in the Strabane Loan Fund Society, against O'Neill and Jordan, trustees of the Society, to raise the amount of her debenture. The order was made on the 14th June, 1897, referring the matter to Chambers to ascertain the different incumbrances, and their priorities. Subsequently the Loan Fund Board intervened, and an order was made on the 4th March, 1901, that the Board should be at liberty to enter into possession of the funds and property of the Society, and that they should take proceedings to wind up the Society. In the winding-up, it appeared that some of the debentures were of different dates, and had been issued in different years, from 1889 to 1895—the plaintiff's was issued in 1895. The question was raised in the winding-up—whether the debentures issued by the

(1) Before LORD ASHBOURNE, C., and FITZGIBBON, WALKER, and HOLMES, L.JJ.

Appeal. Society took priority as of their respective dates, or should be paid
1903. *pari passu*?

STEWART
v.
O'NEILL. The rules of the Society applicable to the present matter were
as follows:—

1. The amount raised on debentures shall not exceed £3000 at any time.

11. Funds may be raised for the use of the Society by deposits, bearing interest at a rate not exceeding £5 per cent. per annum. Debentures shall be issued to each depositor of £20 or more, and deposit receipts shall be issued for deposits of less than £20. No interest shall be payable on fractional parts of a pound.

Three months' notice shall be required previous to the withdrawal of any sum lodged on debentures, and four weeks' notice previous to the withdrawal of any sum lodged on deposit receipts: provided always, that nothing contained in this rule shall prevent any depositor or debenture-holder being paid the full amount of his deposit, or any part thereof, at any time it may be convenient to the Society to pay it, on such payment being ordered by the committee.

12. Every such debenture or deposit receipt may be transferred and assigned by the owner or owners to any other person or persons, such transfer not to be valid until registered in the books of the Society. Holders of debentures exceeding in amount £100, shall transfer such surplus debentures on being required to transfer the same by a majority of the committee, or by the Loan Fund Board, and on being paid or tendered the amount due thereon by any person or persons wishing to become a depositor; and in case of refusal to make such transfer when so required, interest shall cease to be payable in respect of such surplus debenture or debentures from the date of such tender.

21. [After providing for an annual meeting of the Society, at which a statement of the assets and liabilities of the Society should be produced, proceeded as follows:—] The clear profits of the Society for the past year having been declared, and ascertained to be correct, the meeting shall then proceed to allocate at least one-tenth of such clear nett profits to the fund for the security of the debenture-holders, pursuant to the 44th section of 6 & 7 Vict. c. 91.

On the 23rd March, 1903, the Master of the Rolls decided that the debentures should be paid in priority of date. From that order the plaintiff appealed.

Henry, K.C., and Bird, for the appellant:—

These debentures should be paid *pari passu*. There is

no specific property of the Society pledged as security for their repayment: *Andrew v. Swansea Cambrian Benefit Building Society* (1). Moreover, the form of debenture given in the schedule to the Act, 6 & 7 Vict. c. 91, shows that the debentures were payable on demand. The debenture-holder serves his notice in writing, asking for payment, and the secretary must pay. The debenture-holders have a charge on the general assets of the Company, and are entitled to be paid *pari passu* after payment of the outside creditors: *Murray v. Scott* (2). The trustees of the Society could not pledge any specific portion of the Society's assets; such an act would be *ultra vires*: *Small v. Smith* (3).

Appeal.
1903.

STEWART
v.
O'NEILL.

Oulton, for E. O'Reilly, a holder of one of the debentures issued in 1889:—

The holders of the debentures must be paid *inter se* in priority of the dates of their debentures: *Gartside v. Silkstone and Dodworth Coal and Iron Company* (4); *In re Pyle Works* (5). If two sets of debentures are issued by a Joint-Stock Company, each purporting to be a first charge, the first set of debentures is entitled to priority: *Smith v. English and Scottish Mercantile Investment Trust* (6).

From the form of the debentures themselves it is obvious that some priority was intended; the moment the debenture was issued there was a charge on the property which took effect from its date.

O'Connor, K.C., appeared for the Loan Fund Board.

LORD ASHBOURNE, C.:—

This is an appeal from the decision of the Master of the Rolls, and it involves an interesting and important question, which affects the *status* of all debenture-holders in Loan Fund Societies in the event of their being wound up. The defendants are the trustees of the Strabane Loan Fund Society, which is being wound up. The Master of the Rolls, to whose Court the matter was attached, made an order in the winding-up that the debentures

Nov 20.

(1) 56 L. J. K. B. 428.

(2) 9 A. C. 519.

(3) 10 A. C. 119.

(4) 21 Ch. D. 762.

(5) 44 Ch. D. 534.

(6) W. N., 1896, p. 86.

Appeal. ranked in priority according to the dates of their issue. An
 1903. appeal has been taken from that order, and the broad contention
 STEWART is this: the Master of the Rolls having decided that the priority of
 v. the debenture-holders *inter se* was to be determined by the dates of
 O'NEILL. their issue, is that decision right or ought they to be paid *pari*
 Lord *passu*? The statute practically controlling and regulating these
 Ashbourne, C. Loan Fund Societies is the Act 6 & 7 Vict. c. 91.

Mr. O'Connor, on the part of the Loan Fund Board, has informed us that the practice which prevailed was different from the rule laid down by the judgment of the Master of the Rolls, and that in the case of two of these Societies, which had been wound up previously, the debentures had been paid *pari passu*.

The word "debenture" in this legislation may be misleading, because debenture in this Act of Parliament and in the general scheme of these Societies has a different meaning from what it has in the case of railways, and other great companies. It is, therefore, necessary to use the word with great caution. The distinction between debenture-holders in such companies on the one hand, and Loan Fund Societies on the other, is this: that the debenture-holders here are members of the Society—in fact they might be called partners in a sense. These debentures are charged on the property of the Society; but the form of these debentures is also noteworthy, and indicates the difference from debentures in the great companies, which have priority over ordinary and preference shares. The debenture here was practically an accountable receipt, and it is payable only out of the property and capital of the Society. It was necessary to give a charge to indicate a fund where they were to look for payment, and a probable further reason why that was inserted was to show that there was no personal liability on the part of the officers of the Society who issued it, and to show that the debenture-holder could look for payment only to the capital and funds of the Society.

The case was not apparently presented to the Master of the Rolls—indeed it was not argued—that these persons, though called debenture-holders, were members of the Society, and not, strictly speaking, debenture-holders. If they were members, and

each received his money in the way I have indicated, *prima facie* none of them was entitled to priority over the others, and they would be paid *pari passu*. The clause providing for the payment of the debentures strongly supports that view, and also the words of section 36, that is, they are a charge on the property of the Society, and, in addition to the necessity of giving them a charge, the reason they were given it was to save the officials, and prevent them from incurring liability.

Mr. O'Connor, when asked to indicate the view of the Loan Fund Board, stated at once that the convention of these parties to be paid *pari passu* was right, and he added, what was of course of importance, that that had been the practice, and it had not worked inconvenience, nor had it ever been challenged. I do not see any reason in law why we should interfere with the practice. In my opinion, the decision of the Master of the Rolls cannot be supported, and the appeal should be allowed.

Appeal.
1903.

STEWART
v.
O'NEILL.

Lord
Ashbourne, C.

FITZ GIBBON, L.J.:—

The main ground of applying the rule *Qui prior est tempore potior est jure* was found in the words of section 36, and of Schedule A, Form No. 3, which declare Loan Fund debentures to be charges on the capital and property of the Society; from this it has been held by the order under appeal that each debenture is a distinct charge, ranking as a charge from the date of its issue.

I think that the main, if not the only, object of section 36 is not to secure the debentures by making them charges, but is to exclude any personal liability of the officers, and to emphasize the fact that the property of the Society alone is liable to the debentures. The words of the Form substantially follow those of the section, but are more specific in expressly declaring the debenture to be a charge upon the funds and property of the Society. But in what sense, and in what priority? The words of charge are, in my opinion, used to define the security for the debentures in general; they do not make each debenture a distinct charge, nor do they indicate that any one debenture takes priority of any other, but only that each debenture, on its issue, becomes an item of the debenture debt which is charged upon the property of the Society.

Appeal.
1903.

STEWART
v.

O'NEILL.

Fitz Gibbon,
L.J.

I find it impossible to allow the debentures to rank as charges, or otherwise, in different priorities *inter se* consistently with other provisions of the statute, with the character of the debenture debt, with the nature of the business, or with the intention of Parliament or of the parties. In the first place, what are "the Capital and Property" of sect. 36 (called "Funds and Property" in the Schedule) which are the subject of the charge? The property, primarily and chiefly, consists of money advanced by the debenture-holders themselves. In the next place, it consists of money lodged with the Society by depositors; and lastly, it consists of any profits earned by the Society from the business of money-lending and banking. The profits, if any, consist of the difference between the amount received for interest from those to whom loans are made, and the amount paid for interest to debenture-holders and depositors; in other words, these Societies mainly make their profit by taking money in at a lower rate of interest, and letting it out at a higher rate. The very nature of the business makes it impossible to fix anything in the nature of a legal or specific mortgage upon the capital engaged in it; the "charge" must, at best, be a floating charge or hovering lien, and to give priority to the debenture-holder first in date would give him, while his money was out on loan, a charge on the money of every debenture-holder who afterwards brought money into the office for the purpose of being lent out.

At the passing of this Act, 6 & 7 Vict. c. 91, debenture stock, as now known, was only in embryo, and though called debentures, these securities are in reality shares of the capital which the Act empowered the Society to raise for the purpose of carrying on the statutory business. It seems to me to be repugnant to the object of the Act to give priority according to date to the subscribers of the capital *inter se*, and this repugnancy is further indicated by the provisions limiting the total amount of the debentures, and prescribing their form, and defining their operation, by words common to them all.

The provisions for repayment of the debentures appear to me to be inconsistent with anything except payment *pari passu*. If a debenture-holder wished to reduce the amount of his advance, he must give up his old debenture and take a new one; if he

wanted to increase it, he might possibly take a new debenture for the further advance; but he might exchange the old one for a single new debenture: a debenture-holder might draw his interest, add it to the advance, and take a new debenture for the full sum. On all such dealings the idea of losing or changing priority would not occur to anyone; and the whole debenture debt, in respect of all such transactions, must rank *pari passu*, if the objects of the Act are to be attained.

As to costs—The plaintiff, Leah Stewart, claimed priority for herself because she was plaintiff. O'Neill did not appear before the Master of the Rolls, before whom the only contending parties were the Loan Fund Board and the plaintiff. The plaintiff served notice of appeal against the order regulating priority by time, and Mr. Oulton's client then came in to support it. The Loan Fund Board might have argued the case according to their view of the law, but Mr. O'Connor told us that he had only a watching brief, and we had to call for his active assistance. A party coming in, as O'Reilly did, in his own interest, if he fails, should not get costs, but under the circumstances we shall give no costs against him. The Loan Fund Board chose to allow Mr. Oulton's client to argue the case in support of the order, and we decline to put their costs of watching the proceedings on the fund; the plaintiff will get her costs in the winding-up, and the Loan Fund Board and Mr. Oulton's client will abide their own costs of the appeal.

Appeal.
1903.
STEWART
v.
O'NEILL.
Fitz Gibbon,
L.J.

WALKER, L.J. :—

In this case the Master of the Rolls had not the advantage which we have had of hearing the case argued by counsel on both sides. Consideration has satisfied me that priority according to date is inconsistent with the nature of debentures issued by Loan Societies under the Act and the circumstances of their constitution.

The giving of a debenture by a Loan Society was first authorised by the 14th section of 1 & 2 Vict. c. 78, which authorised the issue of a debenture for every deposit, and the Act at present in force, 6 & 7 Vict. c. 91, substantially adopts its provisions. The legislation is contained in sections 35 and 36, which must be read in connection with the form prescribed in the schedule. Section 35 says: "It shall be lawful for every such Society estab-

Appeal.
1903.

STEWART
v.
O'NEILL.

Walker, L.J.

lished or acting under this Act, which shall be desirous of raising funds for the purposes of said Society or of increasing the funds of said Society, to issue debentures in a form and on paper or parchment to be supplied by the Loan Fund Board."

Then comes the form, which is headed "Form of debenture or security for the payment of money lent to a Loan Society." The form is: "This is to certify that A B, of , has this day deposited with C D, the treasurer of the Loan Society, the sum of , to be repaid out of the funds of the said Society to the said A B, his executors, administrators, or assigns, at the expiration of calendar months after a demand thereof in writing shall have been made upon the treasurer, and to bear interest until repaid at the rate of per cent. per annum, to be paid half-yearly (or otherwise as agreed upon); and it is hereby declared that the said principal sum and interest shall be a charge upon and payable out of the funds and property of the said Society, and such funds and property only; and that the treasurer and other officers and members of the said Society or any of them shall not, severally or collectively, be responsible for the payment thereof from or out of any other funds whatsoever."

This declaration is meant to be the expression of sect. 36, which is: "No treasurer, trustee, or other officer of any Loan Fund Society subscribing a debenture shall be individually responsible in person or property for the payment of the same, or of any interest thereon; but such debenture shall be a charge on the capital and property of the Society alone, unless such treasurer, trustee, or other officer shall, in the instrument, or by writing at the foot or on the back thereof, declare his or their willingness to be liable in person or property for the specific sum so guaranteed."

This section is pointed, I think, to the exclusion of personal responsibility of the officers, and not to the creation of a charge such as we are familiar with in the case of debentures of a company, and the words beginning with "unless" illustrate this; for suppose an officer had declared his willingness to be liable in person or property for the loan, the obligation should be of the same character.

A "debenture" has several meanings, and in any case it means what, indeed, is its primary signification—an acknowledg-

ment of a debt, and, I think, in the Act it was intended to mean no more, and that the remedy given (unless in case of dissolution) is to call in by demand, in this case by the rules one month, while ordinary deposits can be called in by a week's notice. They are really deposit receipts of a special kind, with a special mode of realization, and the money lent forms part of the funds of the Society to be lent and re-lent as long as they are not called in. Priority might continually shift if this were not so.

It is admitted that on dissolution it has been the settled practice to distribute the funds amongst the debenture-holders *pari passu*, and, in my opinion, they are all merely creditors with equal right, subject to the power of realization which all equally have of realizing by demand made. It is worthy of notice that there is a security created for debenture-holders by the section which enables the Society to create a reserve fund for the security for debentures by setting apart annually one-tenth of its profits, which is a common fund apparently for all *pari passu*.

I concur, therefore, that the order of the Master of the Rolls should be varied.

HOLMES, L.J. :—

The question raised by this appeal, although of great importance to the holders of debentures in Irish Loan Societies, is neither complex nor difficult. Since 1843 these Societies have been regulated by a statute passed in that year—6 & 7 Vict. c. 91. Most of the leading provisions of this enactment were referred to in the judgment given in this Court in *O'Brien v. Mitchelstown Loan Fund* (1); and it is unnecessary for me to repeat what is there said as to the way in which Loan Societies in Ireland are created, managed, and controlled. The material point for the purpose of the present case is the manner in which funds are procured to enable them to carry on their operations; and there are in the Act only a few sections dealing with this subject. By the 35th section it is provided that a Society desirous of raising or increasing its funds may issue debentures in a form and on paper or parchment to be supplied

Appeal.
1903.

STEWART

v.

O'NEILL.

Walker, L.J.

Appeal.
1903.

STEWART

v.

O'NEILL.

Holmes, L.J.

by the Loan Fund Board, that no debenture for a less sum than £20 shall be so issued after the 31st December, 1843, unless it is in lieu of one previously issued, and that debentures shall be transferable in the manner therein prescribed. The 36th section enacts that no treasurer, trustee, or other officer of the Society subscribing a debenture shall be individually responsible in person or property for the payment of the same or any interest thereon, but such debenture shall be a charge on the capital and property of the Society alone, unless such officer shall, in the document, declare his willingness to incur such liability.

The form of debenture given in the schedule is a certificate that A B has this day deposited with the treasurer of the Society the sum named, to be repaid out of the funds of the Society at the expiration of a certain period, after demand in writing, such sum to bear interest at the rate specified; that the principal and interest shall be a charge upon and payable out of the funds and property of the Society, *and such funds and property only*; and that the treasurer and other officers and members of the Society shall not, severally or collectively, be responsible for the payment thereof from or out of any other funds whatsoever.

The rules, the preparation and adoption of which are a condition precedent to the existence of every Loan Society, and which, when certified by the Loan Fund Board, are binding on every person having an interest therein, prescribe the maximum amount of capital to be raised by debentures, and generally provide, as was done in the case now under consideration, that a debenture-holder was to be a member of the Society. A Loan Society may be wound up voluntarily by its members, or compulsorily by the Loan Fund Board, as provided by the 45th section of the Act; and I understand that during the last sixty years this has not been an unusual occurrence. We are told that on these occasions when there was a deficient fund, the practice has been to treat the debentures as of equal priority irrespective of the date of issue, and to pay them *pari passu*. The legality of this course has been for the first time questioned in the present action, in which, through the interposition of the Loan Fund Board, the Strabane Loan Society is being wound up; and the plaintiff has obtained the order appealed from, by which it is declared that the debentures

rank in priority *inter se* according to their respective dates of issue.

The sole argument by which this declaration is sought to be upheld is that as every debenture gives a charge on all the funds and property of the Society, the debenture-holders *inter se* must be regarded as successive chargeants or mortgagees on the same estate, and that the ordinary rule of priority applies to them.

But is this the true position of a person who receives from a Loan Fund Society certified under the Act of 1843, in return for an advance of money, a debenture in the statutory form? The Society is not like a company or individual that is possessed of property and that borrows on the security thereof. Its only property is the sum raised on debentures, and the profits realized by lending the same; and even of these profits a comparatively small part is by the 44th section to be reserved for the security of the debenture-holders, it being contemplated that the larger portion should be applied for charitable purposes. I have already pointed out that persons who obtain debentures become members of the Society; and, as far as I can see, they are its only members. At least I have not been able to find any other qualification for membership. Their position, in fact, resembles that of partners engaged in a common undertaking and contributing the funds required for carrying it on. If this be so, their interest in the property, in the absence of express stipulation to the contrary, would be *pari passu* in proportion to their contributions. Mr. Henry, in supporting this view, has called in aid the provisions as to paying off the debentures by the Society, and as to the right of a debenture-holder to call in the amount advanced by him on giving previous notice. I prefer, however, to decide the case on the constitution of the Society, which is, in my opinion, absolutely inconsistent with the theory of the debentures being successive charges payable according to priority of date. Indeed, I cannot conceive that the question would have been argued were it not for the provision in the 36th section, that the debenture shall be a charge on the capital and property of the Society alone; but it is, I think, clear that the object of this clause, as well of the corresponding words in the form given in the schedule, was to relieve the officers subscribing the debentures from personal responsibility,

Appeal.
1903.

STEWART
v.
O'NEILL.

Holmes, L.J.

Appeal. and not to create any special charge on the capital and property
1903. liable for payment.

STEWART
v.
O'NEILL.
Holmes, L.J. For these reasons, I am of opinion that the appeal should be allowed; and it is satisfactory to find that our decision seems to be in accordance with the view of the Society itself, which has already paid without objection or protest two dividends to the debenture-holders upon the basis that they were all entitled in the same priority.

Solicitor for the plaintiff: *G. A. Bird.*

Solicitor for E. O'Reilly: *T. Mac Grath.*

Solicitors for the Loan Fund Board: *E. & J. Stapleton.*

R. D. M.

V.-C.

1903.

Dec. 17.

IN RE BLAKE'S TRUSTS.

(1903. No. 680.)

Will—Construction—Legatee—Misdescription.

A testator devised his property in trust to pay, *inter alia*, a legacy of £500. to his "godson, the Hon. H. A. J. P., son of Lord G." His godson was in reality the Hon. R. M. P., another son of Lord G. :—

Held, that the legacy passed to the godson, the Hon. R. M. P.

By his will dated 14th March, 1890, Martin Pierce Blake bequeathed all his property to his sister Maria White upon, *inter alia*, the following trust, which was in these terms: "Upon trust as to my chattel property to pay thereout the sum of £500 to my godson, the Hon. Hubert A. J. Preston, son of Lord Gormanstown." The testator appointed his sister executrix.

As a matter of fact, the Hon. Hubert A. J. Preston was not the godson of the testator, but the Hon. Richard Martin Preston, another son of Lord Gormanstown, was; and it appeared from an affidavit of Lord Gormanstown that the testator was in the habit of giving presents to the said Hon. Richard Martin

Preston, and that he took an interest in his welfare and treated him as his godson.

V.-C.
1903.

The present summons was taken out by Lord Gormanstown as next friend of the Hon. Richard Martin Preston, to have it declared that the said Hon. Richard Martin Preston was entitled to the said sum of £500, and not the Hon. Hubert A. J. Preston.

In re
BLAKE'S
TRUSTS.

Garrett W. Walker, for the applicant :—

The only question is whether “godson” is the ruling word. The word comes first, and therefore shows that the intention to benefit his godson was uppermost in the testator’s mind. The case is similar to *Nunn’s Trusts* (1), where the words were “for the benefit of my housekeeper, M. R.,” and the housekeeper’s name was E. R.

Raymond Smith, for the Hon. Hubert A. J. Preston :—

Though there is a misdescription, yet the identity of Hubert A. J. Preston is clear, as the testator has denominated him by his full name, and there is nothing to show that the use of the word “godson” was in any way to be a condition precedent. The rule that “*Veritas nominis tollit errorem descriptionis*” must prevail. Where there are two descriptions the Court takes the one appearing least wrong; and here it is far less likely that the testator should have been mistaken in the name than the fact that the legatee was not his godson. [He cited *Bernasconi v. Atkinson* (2); *In re Blayney* (3).]

THE VICE-CHANCELLOR held, that the legacy passed to the testator’s godson, the Hon. Richard Martin Preston.

Solicitor for the parties : *Beauchamp*.

J. MAC M.

(1) L. R. 19 Eq. 331. (2) 10 Hare, 345. (3) I. R. 9 Eq. 413.

M. R.
1903.

M'CARTHY v. M'CARTIE (No. 2).

April 28.
May 6.

Appeal.

Nov. 6, 9, 10,
26.

Mortgage—Marshalling—Legacies charged on lands—Mortgage of portion of lands charged—Covenant against incumbrances—Payment of legacies out of proceeds of sale of mortgaged lands.

A B devised Blackacre and Whiteacre to C D, subject to legacies in favour of M N. C D mortgaged Whiteacre to a Bank to secure £7000. The mortgage contained a covenant against incumbrances. After C D's death, in an action to administer his real and personal estate, Whiteacre was sold, and the legacies were paid out of the proceeds of the sale, thereby nearly sweeping away the fund out of which the mortgage debt was payable. Blackacre was subsequently sold, and it was held by the Court of Appeal (reversing the decision of the Master of the Rolls) that the mortgagees were, under the doctrine of marshalling, entitled to resort to the fund produced by the sale of Blackacre for payment of the mortgage in priority to simple contract creditors of the deceased C D.

Quære—Whether the other circumstances above stated, apart from the covenant against incumbrances contained in the mortgage, would have entitled the Bank to resort to the proceeds of the sale of the unmortgaged lands.

MOTION by the Bank of Ireland for an order that the sum of £820 14s. 2d. and £15 17s. 3d. cash standing to the credit of this action and separate credit of moneys produced by the sales of the lands of Gortnacloghy, and of the houses 23 and 34 North-street, be paid to the Governor and Company of the Bank of Ireland on account of the moneys due to them, and for the costs of the motion.

Daniel M'Carthy, by his will dated 26th July, 1859, reciting a power of appointment given him by his marriage settlement over a sum of £2000, exercised the same by appointing the said sum to his four younger children, Gerald, Kate, Margaret, and Louisa, the same to be paid to them respectively in equal shares and proportions upon them or each of them attaining the age of twenty-one years, or being females marrying under that age, and in the event of the death of any of the said younger children under the

age of twenty-one, or being females under that age and unmarried, the testator appointed the share of child so dying amongst the survivors. The will then proceeded :—" I devise and bequeath unto my three daughters hereinbefore mentioned, in addition to the sums hereinbefore appointed to them, a further sum of £700 to be payable to each of them at the like rate of 5 per cent. per annum from the date of my decease, subject to the conditions, limitations, and remainders hereinbefore mentioned as to the said sum of £2000, the said several sums of £700 to each of my said daughters, and interest thereon, to be paid and payable out of and charged and chargeable in the first place upon my chattel property, money, and effects ; and if the same shall be insufficient, then the said several sums to be paid and payable out of and charged upon my real and personal estates." The testator next devised his lands of Ardagh (which were real estate) to his younger son Gerald in fee-simple, with a limitation over, in the event of his dying under twenty-one years of age or without issue, to the testator's eldest son Florence Daniel in fee-simple. By his will the testator further devised to his son Florence Daniel absolutely (amongst other property) certain leaseholds, including the lands of Gortnacloghy and the premises 33 and 34, North-street, Skibbereen.

By a codicil to this will the testator bequeathed to each of his three daughters, Kate, Margaret, and Louisa, in addition to the moneys already left them in the will, a further sum of £300 ; this total sum of £900 to be subject to the same conditions as the fortunes already left to them.

Daniel M'Carthy died on the 4th November, 1860, and his will and codicils (including that above-mentioned) were duly proved, 19th January, 1861.

Gerald M'Carthy attained his age of twenty-one years and entered into possession of the said lands of Ardagh, but died without issue on 10th March, 1875, whereupon Florence Daniel M'Carthy (the testator's eldest son) became entitled under the limitations in the will to the said lands.

By an indenture dated the 16th November, 1878, and made between Florence Daniel M'Carthy of the one part, and the Bank of Ireland of the other part, after reciting that Florence Daniel M'Carthy was seized of an estate of inheritance in fee-simple in

M. R.
1903.
M'CARTHY
v.
M'CARTE.

M. R. possession of the lands of Ardagh, subject only to a mortgage for
 1903. the sum of £1500 created by an indenture dated 1st March, 1876,
M'CARTHY and made between Florence Daniel M'Carthy of the one part, and
M'CARTE. Mary Kavanagh of the other part, but free from all other incum-
 brances, Florence Daniel M'Carthy mortgaged the said lands of
 Ardagh to the Bank to secure any sum due on his account current
 with them not exceeding £7000; and by the same indenture
 Florence Daniel M'Carthy covenanted for right to convey, subject
 to the said indenture of mortgage of 1st March, 1876, for quiet
 enjoyment by the Bank after default, subject only to the rights
 of persons claiming under the same indenture of mortgage free
 from incumbrances except the said mortgage, and for further
 assurance.

Florence Daniel M'Carthy died in 1879, and this action was
 shortly afterwards instituted to carry out the trusts of his will and
 to administer his estate.

Prior to the action the two legacies of £700 and £300
 bequeathed by Daniel M'Carthy's will and codicil had been paid
 to Margaret M'Carthy, but the legacies to her sisters Kate and
 Louisa were not paid, though interest on the principal sums
 bequeathed to them was paid at the rate of 5 per cent. per annum
 by Florence Daniel M'Carthy, with whom they resided. Kate
 M'Carthy died in 1889, having by will appointed her sister Louisa
 (who proved her will) sole legatee and executrix.

Under an order made in this action, dated 4th February,
 1892, the lands of Ardagh were sold. They produced the sum of
 £3957 10s. 9d., out of which the sum of £1500 due on the mort-
 gage of 1st March, 1876, was paid to Mary Kavanagh. Louisa
 M'Carthy then claimed to be paid out of the residue of the said
 purchase-money the legacies bequeathed by her father Daniel
 M'Carthy to her and her sister Kate M'Carthy, on the ground that
 the said legacies were by the will of Daniel M'Carthy charged on
 the lands of Ardagh. This claim was held to be valid by an order
 made by the Master of the Rolls, 29th January, 1896, affirmed by
 the Court of Appeal, 23rd June, 1896, and by the House of Lords,
 18th November, 1897 (1); and as the result of this decision the said

legacies were paid out of the residue of the said purchase-money, thus sweeping away nearly the entire proceeds of the lands included in the Bank's mortgage.

Pursuant to a further order made in this action on 10th June, 1902, the lands of Gortnacloghy and the houses 33 and 34, North-street, Skibbereen, were sold and realised a sum of money which was now represented by the sums of £820 14s. 2d. new Consols, and £15 17s. 3d. cash standing to the credit of the action, and separate credit described in the notice of motion. Against this fund the Bank now claimed to be entitled to stand in the place of the legatees, Kate M'Carthy and Louisa M'Carthy, to the extent of the moneys paid on foot of their legacies out of the purchase-money of the lands of Ardagh. The claim so made by the Bank was resisted by the creditors of Florence Daniel M'Carthy, whose interests were represented by the said Louisa M'Carthy pursuant to an order of the Master of the Rolls, whereby she, being one of such creditors, was appointed to represent the class.

M. R.
1903.
M'CARTHY
v.
M'CARTIE.

T. Pakenham Law, K.C., and J. H. Shaw, for the Bank of Ireland, in support of the motion.

Matthew J. Bourke, K.C., and Patrick Fleming, contra.

The arguments of counsel will be found reported in the case on appeal, p. 113.

THE MASTER OF THE ROLLS:—

This case comes before me on an application by the Bank of Ireland for an order "that the sum of £820 14s. 2d. stock, and £15 17s. 3d. cash standing to the credit of *M'Carthy v. M'Cartie*, and separate credit of moneys produced by sales of lands of Gortnacloghy, and of the houses 33 and 34, North-street, be paid to the Governor and Company of the Bank of Ireland on account of the moneys due to them, and for the costs of this motion."

M. R.
1903.
M'CARTHY
v.
M'CARTIE.

Under the will and a codicil of Daniel M'Carthy, the three legacies of £700 each, augmented by £300 each, and which I shall hereafter call legacies of £1000 each, were charged upon all his real and personal estate, including Ardagh, which is real estate. By the same will Ardagh was devised to testator's son Gerald, with a limitation over in fee to Florence Daniel, in the event (which happened) of Gerald dying under twenty-one or without issue, under which limitation his title accrued, and not as heir. Daniel M'Carthy died in 1860. Gerald died in 1875. On the 16th November, 1878, Florence Daniel M'Carthy mortgaged Ardagh to the Bank of Ireland to secure £7000. That sum and considerably more is due to the Bank. Florence Daniel the mortgagor died in 1879, and this suit was brought to carry out the trusts of his will and administer his estate.

One of the legatees of Daniel M'Carthy for (as I shall call it) £1000 was paid off long since. The other two similar legacies, and also a mortgage for £1500 (prior to the mortgage to the Bank), have been paid off out of the proceeds of a sale of Ardagh ordered and carried out in this action; leaving the claim of the Bank so far unprovided for. The question whether, in the events which happened, Ardagh was charged with these legacies went to the House of Lords (*Bank of Ireland v. M'Carthy* (1)), and was decided in accordance with the decisions in this country, though apparently on different grounds, in favour of Miss Louisa M'Carthy, the legatee of one legacy of £1000, and personal representative of the remaining one. Therefore the Bank has received nothing (or very little) on foot of its mortgage out of Ardagh.

In these circumstances the present claim arises, and it is this:—Florence Daniel M'Carthy, besides Ardagh, derived under his father's will other lands, including a denomination called Gortnaelogy and some house property, which have been sold in this action, the proceeds being represented by £820 14s. 2d. new Consols and £15 17s. 3d. cash. The Bank's mortgage does not extend over this property or any part of it; but they say that it was charged with the legacies in Daniel's will (as undoubtedly it

was) ; that the legatees had therefore two funds to look to, Ardagh and Gortnacloughy ; that the Bank had but one, Ardagh, and that therefore on the doctrine of marshalling, since the Bank's fund has been swept away by the legatees, they are entitled to take the place of the latter, and so to claim the proceeds of Gortnacloughy. The principle asserted is that shortly stated in the note to *Aldrich v. Cooper* (1), that " a person having two funds to satisfy his demands shall not by his election disappoint a party who has only one fund."

In terms, this statement applies to the present case. The question is whether any such principle applies to the facts of the present case : whether in fact such a statement of the principle is not too compendious to be always correct.

It is more fully and exactly stated by Lord Hardwicke in *Lanoy v. Duke of Athol* (2). " Suppose a person, who has two real estates, mortgages both to one person, and afterwards, only one estate to a second mortgagee, who had no notice of the first : the Court, in order to relieve the second mortgagee, have directed the first to take his satisfaction out of that estate only, which is not in mortgage to the second mortgagee, if that is sufficient to satisfy the first mortgage, in order to make room for the second mortgagee, even though the estates descended to two different persons."

There are of course other limitations of the general rule not necessary to dwell on here, as that marshalling is not to be to the prejudice of the creditor having two securities : or of third parties, though in that category the assignees of a bankrupt mortgagor are not to be classed, for they simply represent him for all purposes.

In this case Miss M'Carthy had under Daniel's will a charge upon Daniel's real estate ; for simplicity, say, two denominations. Subject to that charge, both these denominations became the property of Florence Daniel M'Carthy, who mortgaged one of them to the Bank. But the Bank's mortgage was a charge not upon the estate of Daniel, but upon that of Florence : while Miss M'Carthy's charge was created not by Florence, but by

(1) 1 Wh. & Tnd. Lead. Cas. 36.

(2) 2 Atk. 444.

M. R.

1903.

M'CARTHY

v.

M'CARTIE.

Daniel. This would be more clear if her claim had been under a mortgage made by Daniel, instead of a charge created by his will, under which Florence took nothing save subject to her charge. If Florence had not mortgaged to the Bank, of course no claim on his behalf to marshal could have arisen. The owner of the charge could raise it as she pleased, out of any part of the property pledged; and no right to marshal arises as between a charge and an estate, but only as between two charges upon the property of the same debtor. Miss M'Carthy is largely interested as a creditor of Florence in opposing the claim of the Bank to stand in her shoes as an incumbrancer upon the proceeds of sale of Gortnacloghy, but she has no specific lien upon that as a creditor. Can the mortgagee of Florence compel her to marshal to her own prejudice? All her rights in respect of her legacies are under the will and against the various classes of the assets of Daniel. The rights of the Bank are not against the estate of Daniel, but that of Florence, whose covenant they have binding him and his personal estate. Miss M'Carthy has not, and never had, any such right, so far as the legacies of Daniel's will are concerned. No act of Florence's could have avoided her security, which he did not create, or altered its security in any way. In *Ex parte Kendall* (1) Lord Eldon says: "We have gone this length, if A has a right to go upon two funds and B upon one, having both the same debtor, A shall take payment from that fund, to which he can resort exclusively; that by those means of distribution both may be paid. That course takes place where both are creditors of the same person, and have demands against funds the property of the same person. Here, it is true, there may be creditors who have demands against the four, and others who have demands against the one; but it was never said that if I have a demand against A and B, a creditor of B shall compel me to go against A without more; as if B himself could insist that A ought to pay in the first instance as in the ordinary case of drawer and acceptor, or principal and surety; to the intent that all the obligations arising out of these complicated relations may be satisfied: but if I have a demand against both, the creditors of B have no right

(1) 17 Ves. 514, at p. 520.

to compel me to seek payment from A ; if not founded on some equity, giving B the right for his own sake to compel me to seek payment from A. If therefore I had before me a case in which it was clear that the creditors of the five could go against the estate of Devaynes and the four, yet, if it was not also clear that the latter could have turned those creditors against the other fund, it does not advance the claim, that without such an arrangement they will get less. Unless they can establish that it is just and equitable that Devaynes's estate should pay in the first instance, they have no equity to compel a man to go against that estate, who has resort to both funds."

In his learned chapter on the marshalling of securities Judge Story says (s. 634) :—"The same principle applies to one judgment creditor, who has a right to go upon two funds, and another judgment creditor, who has a right upon one only of them, both belonging to the same debtor. The former may be compelled to apply first to the fund which cannot be reached by the second judgment, so that both judgments may be satisfied. But if the first creditor has a judgment against A and B, and the second against B only, and it does not appear whether A or B ought to pay the debt due to the first creditor, nor whether any equitable right exists in B to have the debt charged on A alone ; in such a case, equity will not compel the creditor first to take the land of A in satisfaction ; for it is not (as we shall presently and more fully see) a case of different debts and securities against one common debtor. Another case may easily be put to illustrate the general doctrine and the exceptions to it. Suppose the mortgagor to mortgage two estates to the mortgagee, and afterwards he should mortgage one of the estates to B and the other to C by distinct mortgages, and B and C should each have knowledge of the first mortgage, and C should also have notice of B's mortgage at the time of taking his own ; and the mortgaged estates should finally turn out not to be sufficient to pay all the three mortgages : in such a case it would seem that B would not have any right to have the estates marshalled, so as to throw the whole charge upon the estate mortgaged to B, for he has no superior equity to C, and, therefore, the charge of the first mortgage ought to be rateably apportioned between B

M. R.
1903.
M'CARTHY
v.
M'CAFTIE.

M. R.
1903.

and C. But this must be propounded as open to some doubt, as there is a conflict in the authorities."

M'CARTHY
v.
M'CARTIE.

Then (sect. 637) he says:—"Lord Kaims has put the very case as founded in a clear and indisputable principle of natural equity. After having adverted to the cases of sureties (*fide jussores*) and *correi debendi* (debtors bound jointly and severally to the same creditor), he proceeds to state:—"Another connection of the same nature as the former is that between one creditor, who is infest in two different tenements for his security, and another creditor who hath an infestment on one of the tenements of a later date. Here the two creditors are connected by having the same debtor, and a security upon the same subject. Hence it follows, as in the former case, that if it be the will of the preferable creditor to draw his whole payment out of that subject, in which the other creditor is infest, the latter, for his relief, is entitled to have the preferable security assigned to him, which can be done upon the construction above mentioned.'"

Again, at sect. 642:—"But although Courts of Equity will thus administer relief to both parties in cases of double funds, which are subject to the same debt, and will, in favour of sureties, marshal the securities for their benefit; yet this will be so done only in cases where no injustice is done to the common debtor; for then other equities may intervene. And the interposition always supposes that the parties seeking aid are creditors of the same common debtor; for if they are not, they are not entitled to have the funds marshalled in order to leave a larger dividend out of one fund for those who can claim only against that. The principle may be easily illustrated by supposing the case of a joint debt due to one creditor by two persons, and a several debt due by one of them to another creditor. In such a case, if the joint creditor obtains a judgment against the joint debtors, and the several creditor obtains a subsequent judgment against his own several debtor, a Court of Equity will not compel the joint creditor to resort to the funds of one of the joint debtors, so as to leave the second judgment in full force against the funds of the other several debtor. At least it will not do so unless it should appear that the debt, though joint

in form, ought to be paid by one of the debtors only ; or there should be some other supervening equity." He says (sect. 643) :
 " Another case has been put, of a similar nature, by Lord Eldon," and then he quotes the passage I have read from *M. R.*
Ex parte Kendall (1). 1903.
M'CARTHY
v.
M'CARTIE.

Ex parte Hartley (2) was mainly relied on by plaintiffs. That was a peculiar case, and, in my opinion, when properly examined, does not touch the present one. There a bankrupt had two estates, both of which had been devised to him charged with the payment of legacies, and he had mortgaged each of them separately to different persons. One of the estates was sold in the bankruptcy and realised enough to satisfy the mortgage debt and leave £1000 surplus, about enough to pay off all the unpaid legacies if they were thrown on it. The other estate would not have produced any surplus after paying off the mortgage charged on it, and the question was not one that arose between legatees and mortgagees, but the question was between the mortgagees of the last mentioned estate and the assignees. The bankrupt had mortgaged to two persons, and the petition was presented by the representatives of the second mortgagee. Lord Erskine pointed out that it was not a case between legatees having charges on the lands and mortgagees at all. He begins his judgment by saying :—" This is not a question between the legatees and the petitioners, but between the petitioners and assignees. At the time of *Tristram's* bankruptcy he possessed the equity of redemption in two estates, which had been severally the subject of charge and mortgage by him, both of which were charged with some legacies remaining unpaid under the will of *Ellen Williams*. Both the estates have been sold, and the assignees claim that the unsatisfied legacies should be paid out of the purchase-money of one estate, in exoneration of the purchase-money received from the other. The petitioners, on the contrary, who are mortgagees of the other estate under a decree of the Court of Chancery, insist that the legacies should be charged on the first mentioned estate ; on the ground that the proceeds of the sale of the estate mortgaged to them would not pay their debt of £2535 if the legacies were charged on that estate ; while the

(1) 17 Ves. 520.

(2) 1 Deac. 288.

M. R.
1903.
M'CARTHY
v.
M'CARTIE.

first mentioned estate is well able to satisfy that charge, as well as the mortgage debt of Gilson and Batty." And he says: "If in the present case there had been a special contract by the petitioners to bear part of the legacies, they must have abided by such contract; but the whole contract on their part arises from the deposit by the bankrupt of the title deeds creating an equitable mortgage, and must be considered the same as if a legal mortgage had been executed by the bankrupt. By the will, through which the bankrupt derives his title, the legacies are charged upon all the estates; and I am of opinion that the petitioners may call on the legatees to take their legacies out of that estate, which is able to satisfy them the amount of their legacies, without resorting to that estate, which will barely pay the petitioners the amount of their debt, and that if the legacies had already been paid out of the estate pledged to the petitioners, then that the petitioners might have stood in the place of the legatees *pro tanto* against the other estate. The bankruptcy of the mortgagor makes no difference; for the assignees take, subject to all equities, which were good against the estate before the bankruptcy. I therefore think that the petitioners are entitled to have the surplus of the proceeds of the sale of the estate mortgaged to Gilson and Batty, after satisfying the amount of their mortgage, applied to the payment of the legacies, before resort is had to the property mortgaged to the petitioners." And Sir J. Cross, one of the Commissioners, says: "The question in this case depends altogether upon the allegation in the petition, 'that the intent and meaning of Tristram, when he took in the proposal before the Master, and before and at the time when Tristram made the deposit, and when the Master made his report, and when Tristram wrote the letter to Preston, was, that the hereditaments, other than the lands called Gowdy Lands and Castlebar, should be exclusively charged with, and the fund to pay, the unpaid legacies under W. Williams's will.'" He discusses the matter as a question of fact, and says: "This last fact convinces me that the allegation in the petition is true; and that the bankrupt must have communicated his intent to the Master, when he deposited the title deeds, that the legacies were to be charged solely on the remainder of the estate. If the bankrupt, then, had the

power to transfer the charge to the remainder of the estate, it appears to me that he has exercised that power. As against him, therefore, it is clear that the petitioners are entitled to an unincumbered charge on the estate which he pledged to them. Nor does his subsequent bankruptcy make any difference in the case, for the assignees can only take subject to the equities that bind the estate of the bankrupt." And Sir George Rose says:—"The case presented for our consideration is not one, perhaps, which should have regularly come before this Court, as it would more properly have been submitted to another jurisdiction; but I think the petitioners were wise in coming here, having adopted the shortest and cheapest course of proceeding. There is nothing in the arguments against the prayer of this petition. The bankrupt, having the entire interest in the estates devised by will takes them, subject to the legacies which the testatrix charged upon them. The difficulty was, how far the acts of the parties would exonerate a part of the estate by throwing the charge on another portion of it. It appears, however, that the intent of the bankrupt was that this charge should be transferred to a particular portion of the estate, and that other parties have acted on this understanding. The question is, then, how far the bankruptcy of Tristram alters the equitable rights of the parties interested. Now the equity of the petitioners is not merely a personal equity against the bankrupt, but an equity against the estate. His assignees, therefore, who take by operation of law, take subject to all the equities which bound the estate, and are consequently bound, as the bankrupt would have been bound himself." Those passages are the substance of the three judgments in the case, and show that it is wholly distinguishable from the present, and that the decision turned mainly on contract and conduct. It was not a case between the legatees and the mortgagees at all. The legatees could not be injured by anything done. The marshalling left them wholly unaffected, and they did not in any way oppose it. It was really between two mortgagees and the assignees of the bankrupt mortgagor. The case, therefore, has no bearing upon that before me. I am of opinion that no right to marshal was conferred upon the Bank by their mortgage as against Miss M'Carthy to the

M. R.

1903.

*M'CARTHY**v.**M'CARTRH.*

M. R. prejudice of her rights as a creditor of Florence Daniel M'Carthy
1903. by reason of her having obtained payment in legal and proper
M'CARTHY order and priority of her legacies charged by the will of Daniel.
v.
M'CARTE. Her rights are paramount to those of Florence, or anyone claim-
ing under him, and she cannot be deprived of them under pretext
of marshalling, or in any other way, by Florence or his assigns,
through whom she claims nothing. The Bank will be entitled of
course to rank as creditors of Florence in the administration of his
assets.

The result at which I have arrived on the grounds I have
discussed renders it unnecessary for me to consider any of the
other topics urged, and I abstain from doing so.

R. W. L.

The Bank of Ireland appealed to the Court of Appeal (FitzGibbon, Walker, and Holmes, L.JJ.).

Appeal.
1903.

M'CARTHY

v.

M'CARTHEE.

Nov. 6, 9,
10, 26.

T. Pakenham Law, K.C., and *J. H. Shaw*, for the appellants:—

By the doctrine of marshalling, where an estate is—as Florence Daniel M'Carthy's was here—subject to debts, legacies, and other charges, and the owner mortgages a portion of such estate—as Florence Daniel M'Carthy here mortgaged the lands of Ardagh to the Bank—the mortgagee will, as against the mortgagor or those claiming under him—like the creditors here—have a right to throw the previously existing charges upon that part of the estate which is not comprised in his security: *Haynes v. Forshaw* (1); *Finch v. Shaw* (2); *Ex parte Hartley* (3); *Ranclylffe v. Parkins* (4); *Lanoy v. Duchess of Athol* (5); *Scott's Estate* (6).

Again, the Bank's mortgage contains a covenant against incumbrances, and the effect of that, as between the mortgagee and the mortgagor (and his simple contract creditors), is to throw the legacies charged by Daniel M'Carthy's will over on the lands of the mortgagor not included in the mortgage; and when these legacies were paid out of the proceeds of sale of the lands mortgaged to the Bank, the Bank became entitled to enforce the legatee's rights against the other lands, there being no other mortgage affecting those other lands: *Averall v. Wade* (7); *Roche's Estate* (8); *Chappie v. Rees* (9); *Ker v. Ker* (10); *Hughes v. Williams* (11); *In re Jones* (12); *Barnes v. Racster* (13); *Handcock v. Handcock* (14).

Matthew J. Bourke, K.C., and *Patrick Fleming*, for the respondent:—

The appellants seek to extend the doctrine of marshalling: its true limits are stated in the judgment of the Master of the

(1) 11 Hare, 23.

(2) 5 H. L. Cas. 905; 19 Beav. 500.

(3) 1 Deac. 288.

(4) 6 Dow. 216.

(5) 2 Atk. 444.

(6) 14 Ir. Ch. R. 63.

(7) L. & G. temp. Sugden, 252.

(8) 25 L. R. Ir. 271.

(9) 1 De G. M. & G. 393.

(10) 1 R. 4 Eq. 15.

(11) 3 Mac N. & G. 683.

(12) [1893] 2 Ch. 461.

(13) 1 Y. & C. C. C. 401.

(14) 1 Ir. Ch. R. 444.

Appeal. Rolls. The covenant against incumbrances was not relied on in
 1903. the Court below: but it makes no difference, because equity will
 M'CARTHY not marshal securities so as to disturb the rights of third
 v. parties. Simple contract creditors are third parties for the
 M'CARTIE. purposes of this rule: *Hales v. Cox* (1); *Flint v. Howard* (2).

Nov. 23.

WALKER, L.J., delivered the judgment of the Court:—

In this case we are of opinion that the appellants are entitled under the doctrine of marshalling to have the proceeds of the lands of Gortnacloghy, and houses 33 and 34, North-street, applied in payment of their mortgage, inasmuch as the proceeds of Ardagh, which was pledged to the Bank, have been applied in payment of the legacies which were charged upon both lands by the will under which the mortgagor devised the two sets of lands. But I desire to express both for myself and my colleagues our regret that the attention of the Master of the Rolls was not directed in the argument before him to the real equity upon which alone the claim of the Bank can be sustained, or to the authorities which establish the existence of such equity.

The right and duty to marshal funds constantly arise when a Court of Equity is administering those funds, but marshalling is merely an arrangement or adjustment which the Court makes for the purpose of giving effect to some existing or established equity, and the extent to which it will be applied varies according to the nature of the equity on which it is based. The circumstance that A has two funds to pay him, and B has only one, creates of itself no equity as between A and B. There must be other circumstances arising from the contract of the mortgagor, or the condition of the estate, before the equity can exist.

The most obvious case of marshalling would have been if Florence M'Carthy were the owner of both Gortnacloghy and Ardagh, and had mortgaged both estates to the persons who are here legatees, and afterwards mortgaged Ardagh only to the Bank—there would be then an equity in the Bank to make the chargeants on both estates resort to Gortnacloghy in the first

instance, if sufficient, in order that Ardagh might be left free and both be satisfied.

Even this right is subject to the limitation that the marshalling would not be made to the prejudice of a third party—for instance, if Florence M'Carthy had created a third mortgage of both estates, the Court would not marshal in favour of the Bank against the third mortgagee, and that is the well-known principle in the case of *Barnes v. Racster* (1).

The rule in this case which I have first put, and the equity creating it, are founded upon this—that both estates belonged to the same person, and the double fund in the one case, and the single fund in the other, grew out of the act and contract of the one common debtor, the mortgagor. The equity is limited by that circumstance, and, as Lord Eldon says, in *Ex parte Kendall* (2), “that course takes place where both are creditors of the same person, and have demands against funds the property of the same debtor.” It is to this limitation the judgment of the Master of the Rolls is mainly directed.

But a man may be the owner of two estates, both of which are subject to charges paramount to his ownership, and he may by mortgaging one of them create, against himself and those claiming under him, an equity to have the paramount charges paid out of the estate which he retains unmortgaged, and if such an equity is created the Court will give effect to it by marshalling, and I think it is established that such an equity will be created in all cases by a covenant against incumbrances being found in the mortgage which is granted of the one estate.

Such an obligation to indemnify the mortgaged estate would follow the lands retained in the hands of the mortgagor and those claiming under him.

The misfortune in this case is, that the attention of the Master of the Rolls was, in argument and citation of authority, directed only to the first of the rules which I have mentioned. *Re Hartley* (3) was relied upon before the Master of the Rolls, and no doubt the facts there raised the right of the mortgagee to marshal and throw the paramount legacies on the other lands, but the case and decision

Appeal.
1903.

M'CARTHY
v.
M'CARTEE.

Walker, L.J.

(1) 1 Y. & C. C. C. 401.

(2) 17 Ves. 520.

(3) 1 Deac. 288.

Appeal. turn mainly upon the there found express contract and conduct of
 1903. the bankrupt when he was about to execute each mortgage, and
 M'CARTHY it was held that an equity arose out of that, which attached upon
 v. the bankrupt, and therefore upon his assignees. The decision did
 M'CARTIE. not go beyond that.
 Walker, L.J.

I shall consider now whether this rule which I have secondly mentioned exists, and what are its limits, for in the result the argument for the respondent was rested upon supposed limitations of the rule, which limitations, it was contended, existed here.

The case of *Hughes v. Williams* (1) seems to be the first in point. I do not think it necessary to go through it in detail, as it is the same in principle as *Averall v. Wade* (2), which deserves special notice.

Chapple v. Rees (3) arose on the same documents as *Hughes v. Williams* (1) was decided upon, and Lord St. Leonards says:—"The insolvent having by the settlement covenanted to relieve the settled estates from all incumbrances created by him, could never have come into a Court of Equity to make the tenant in tail under that settlement contribute to the discharge of incumbrances subsequent to the date of the settlement. The effect in equity of such a covenant, as between the settlor and the parties beneficially interested under the settlement, was to throw all the debts of the insolvent on his unsettled estates. How far such an equity would bind third parties is not now to be considered."

Finch v. Shaw (4) is precisely like this in the circumstance that these are paramount charges, and the mortgage was made by the devisee of part of the estate, and it was held that, as between the devisee and mortgagee, the latter had an equity to throw the charges on the portion not mortgaged. I do not think the fact of the devisee being also one of the executors made any difference, and no importance is attached to it; on the contrary, it is put aside as immaterial. The Master of the Rolls says:—"As between himself and Mr. Finch, I entertain no doubt but that Mr. Finch would have been entitled to marshal the charge and say, as against Sir John K. Shaw, 'you having granted me a mortgage upon a portion of the property charged with the legacies,

(1) 3 Mac. & G. 683.

(3) 1 De G. M. & G. 393.

(2) L. & G. temp. Sugden, 252.

(4) 19 Beav. 500.

I am entitled to have the legacies first paid out of the other property charged with them.'” It does not appear that there was a covenant against incumbrances in Finch’s mortgage. The case would be stronger if that were so. That decision was affirmed (1).

Appeal.
1903.
M’CARTHY
v.
M’CARTIE.
Walker, L.J.

Haynes v. Forshaw (2) was a similar case, and the title of the plaintiff claiming exoneration arose on an equitable mortgage. The inquiry directed was to ascertain what legacies and charges affected the property comprised in the equitable mortgagee’s security, and there was a declaration that the plaintiff was entitled to have such legacies and charges thrown in the first place upon the estate of the testator, other than the property comprised in the equitable mortgage. I do not see how the position of the son, who borrowed from the plaintiff, being one of the executors created any different equity in the mortgage.

The case of *Scott’s Estate* (3) is an express authority to this extent, that it decides the right of marshalling in favour of the mortgagee of one estate, subject to prior incumbrances as against not only the mortgagor, but his judgment creditor subsequent to the mortgage.

The argument in the Court of Appeal for the judgment creditor was the same as influenced the Master of the Rolls in this case, but it did not prevail. It is not stated whether the mortgage contained a covenant against incumbrances—presumably it did.

The recent case of *Re Jones* (4) is an authority also in point. The second deed was for value, and contained a covenant for further assurance, and it was held by Mr. Justice North that the unsold moiety should bear the entire mortgage debt, and then he cites and applies *Averall v. Wade* (5). The case of *Roche’s Estate* (6), before Mr. Justice Monroe, is another illustration of the same principle.

Mr. Bourke, in his argument for the respondent, contended that the case of *Hales v. Cox* (7) was an authority in his favour. I am unable to see its application. There is a full explanation of

(1) 5 H. L. Cas. 905.

(2) 11 Hare, 93.

(3) 14 Ir. Ch. R. 63.

(4) [1893] 2 Ch. 461.

(5) L. & G. temp. Sugden, 252.

(6) 25 L. R. Ir. 271.

(7) 32 Beav. 118.

Appeal,
1903,
M'CARTHY
v.
M'CARTIE.
Walker, L.J.

the case in the judgment of Lord Chancellor O'Hagan in his judgment in *Ker v. Ker* (1), where he points out that there was no incumbrance when the voluntary settlement was made, and the order of proof given on the voluntary covenant is explained by the rule that such a covenant ranks in priority after simple contract debts. The main ground taken by Mr. Bourke was that the rights of the simple contract creditors of Florence after his death were in a different position from equities against the mortgagor himself. I am myself unable to see how they can be in a higher position than the judgment creditor of the mortgagor in *Scott's Estate* (2). What the creditors take is the right to make assets for them the estate of the mortgagor as it stood at her death, and it passed from him as assets with the equity attached on it.

The case of *Averall v. Wade* (3) seems to me not only an authority on the general question, but to furnish an answer to this argument of Mr. Bourke. There Samuel Wade was seized in fee of several estates, and was indebted on judgments, and on the marriage of his son in 1813 he conveyed one of the estates to the uses of the settlement. This settlement contained a covenant against incumbrances. Another judgment was obtained against him subsequently to the settlement. He died in 1826, and the judgment creditor who had obtained his judgment after the settlement filed a bill. It was held that the prior judgments should be thrown altogether on the unsettled estates, and that the subsequent judgment creditors had no right to make the settled estates contribute. The Lord Chancellor says, at p. 259 :—" They contend that the unsettled estate is to bear both the judgments, and that the second creditor is entitled to no relief against the settled estate. Suppose there was no covenant in the settlement: a man seized of estates A and B, both subject to a judgment debt, settles A for valuable consideration without noticing the judgment, the judgment creditor would be compelled to go against estate B, and the persons claiming under the settlement would be entitled to have the settled estate exonerated at the expense of the unsettled estate; the judgment binds both, and where there is a settlement of part of an estate as if free from incumbrance, equity will throw

(1) I. R. 4 Eq. 15. (2) 14 Ir. Ch. B. 63. (3) L. & G. temp. Sugden, 252.

the whole on the unsettled part which still belongs to the original owner. Here there is a covenant that the estate is free from incumbrances; assuming there was no such covenant, but a mere declaration that the estate was free from incumbrance, there can be no doubt that that declaration would throw the incumbrance on the unsettled estates. The covenant is enforced not by giving damages, because this Court does not give damages, but according to the peculiar jurisdiction of this Court by specifically doing that which ought to be done." And further down he says:—"The equity binds the land—I am not now speaking of a person who takes for valuable consideration without notice, but as against every person, unless a purchaser for valuable consideration without notice, it will be deemed a good settlement. But then it is said that the covenant cannot be specifically executed after the death of parties. I have never heard that point raised before. The covenant in this case is a continuing covenant, and of which there ought to be a specific execution, and in effect it has executed itself, and by force of that covenant the estate must be considered in equity as between the parties as discharged of the judgments which must be thrown on the unsettled estate."

Appeal.
1903.
M'CARTHY
v.
M'CARTIE.
Walker, L.J.

Nothing can be clearer than that statement of the law. I am not to be taken as suggesting that the same right of marshalling would not arise from the mere execution of a deed for valuable consideration without an express covenant against incumbrances. But in this case there is a covenant against incumbrances in the Bank mortgage, the equity from which follows the land as against the mortgagor, and attached on the land when it became assets, and it is impossible that creditors of Florence M'Carthy, who are not purchasers for valuable consideration without notice, can be treated as having higher rights than he himself had during his whole life; why should these rights be higher than those of the judgment creditor, who had a floating lien on the land, and can that judgment creditor have a new and better right as a creditor when his judgment debtor died?

If there is a right of marshalling, this is eminently a case in which it should be applied. All the sales and payments have taken place in the course of a suit for the administration of

Appeal.
1903.

M'CARTHY
v.

M'CARTIE.

Walker, L.J.

Florence M'Carthy's estate, and till all funds have been parted with they are all deemed to be under the control of the Court, and, so far as the present application is concerned, the case is to be dealt with as if the Court had all the funds before it.

We are of opinion that the order of the Master of the Rolls must be discharged, and the application of the Bank granted.

The costs of the Bank should *prima facie* be paid with their demand; but as the fund against which their claim is made is a deficient one, they must be paid their costs here and in the Court below out of the funds representing assets applicable for the general creditors of Florence M'Carthy.

The respondent who was named to represent the interests of those creditors will be paid her costs in the Court below and here out of the same fund.

Solicitor for Bank of Ireland: *Rutherford.*

Solicitor for Louisa M'Carthy: *Downes.*

G. Y. D.

M. R.
1904.

Jan. 19.

IN THE MATTER OF THE TRUSTS OF THE WILL OF ELIZABETH LONG, DECEASED; AND IN THE MATTER OF THE ESTATE OF PETER LONG, JUNIOR, DECEASED; EDMOND LONG, PLAINTIFF; FRANCIS P. LONG, DEFENDANT.

Practice—Time for appeal—Order in Chamber—Motion to discharge—Final order—Judicature (Ireland) Order LVIII., Rule 15.

A motion to discharge or vary a final order made in Chamber must be brought within twenty-one days.

In re Giles (43 Ch. D. 391) followed.

MOTION.

This was an application on behalf of the plaintiff for an order that the order made in Chamber in this matter on May 8th, 1903, be discharged in so far as it declared that under the will of the above-named Elizabeth Long her son Peter Long became absolutely entitled to all her beneficial interest, as then lately pur-

chased in the Landed Estates Court, in the house and premises No. 3, South Great George's-street, in the city of Dublin, and that the same did not pass under the gift over in the said will to the plaintiff, and that in lieu thereof it might be declared that on the death of the said Peter Long the beneficial interest in the said premises passed under the gift over, in the said will to the plaintiff.

M. R.
1904.

LONG
v.
LONG.

The order in question was made on an originating summons taken out under Order LV. The notice of motion was dated December 19th, 1903, and came on for hearing on January 19th, 1904.

Pierce Nolan, for the defendant:—

The motion is out of time. There is no rule limiting the time for an appeal from a decision in Chamber of a Judge of the Chancery Division: see Judicature (Ireland) Act, sect. 54; but the practice in England has been to treat such applications on the same footing as appeals from interlocutory orders under Order LVIII., Rule 8, that is to say, they must be brought within twenty-one days: *In re Giles, Real and Personal Advance Company v. Michell* (1). There are no special grounds for extending the time.

Molony, K.C., for the plaintiff:—

There is no express provision, and the party ought not to be shut out after the lapse of such a short time as twenty-one days from appealing from what is a final order and a determination of the rights of the parties under the will.

THE MASTER OF THE ROLLS:—

No special case is made for hearing this appeal from a decision made so far back as 8th May last, now more than seven months ago; and no explanation has been given for the lapse of time. It was stated by counsel that the plaintiff heard a decision given in the Court of Appeal recently which he thought had a bearing upon his case, though Mr. Molony, his counsel, does not appear

M. R.
1904.

LONG
v.
LONG.

to agree with him in that. There is no case made of any mistake, fatality, or newly discovered evidence. It is simply a case of unexplained delay.

It is true that there is no time fixed by the Judicature Act or the General Orders for appealing (in the Chancery Division) from a Chamber order to the Judge in Court ; but the practice has been to apply the analogy of appeals from interlocutory orders, that is twenty-one days. When a party feels aggrieved by an order in Chamber the usual course is to ask the Judge to make a Court order at once, which in a proper case (*i.e.* when all the facts are before the Court) is always done; and if that course is pretermitted there is undoubted power to extend the time for any good reason. But if the plaintiff here, without any reason, without even a statement by his counsel that the order is wrong or questionable, can obtain an extension of time for the asking, without any affidavit, and against the protest of his opponent, after seven months from the time when the right to appeal accrued, there is no reason why such appeals should ever be barred at all.

Solicitors for the plaintiff : *J. H. Walsh & Co.*

Solicitors for the defendant : *Stanuell & Son.*

W. L.

SEXTON v. O'HALLORAN (1).

Appeal.

1902.

*County Court—Equity jurisdiction—Service out of the jurisdiction—40 & 41
Vict. c. 56, ss. 33, 34.*

Dec. 4.

Where the County Court has jurisdiction to deal with a case so far as its subject-matter is concerned, it has all the powers of the High Court necessary for bringing all proper parties before it, including the power to serve or substitute service of the civil bill out of Ireland.

Appeal, by way of case stated, by direction of the Right Hon. Mr. Justice Johnson, at county Clare Spring Assizes, 1902, for the opinion of His Majesty's Court of Appeal in Ireland.

1. This was an appeal to the Judge of Assize by the plaintiff from a dismiss without prejudice by His Honour the County Court Judge of the county of Clare, of an equity civil bill at Kiltrush Sessions, October, 1901.

2. The case alleged by the plaintiff's bill was that the defendants Griffin and Doherty (as surety or trustee for Griffin) were by lease of 14th December, 1888, lessees for an unexpired term of building ground in the village of Mullagh, county Clare, including a plot (hereinafter for distinction called "vacant plot"); that by deed 5th August, 1893, the defendant Griffin assigned to the plaintiff all Griffin's interest, under a lease 28th February, 1863, in messuages in Mullagh, adjacent to the premises demised by the said lease of 1888, and verbally agreed for himself and Doherty to grant to the plaintiff a right of way over the said "vacant plot" to the messuages demised by the lease of 1863, which right of way the plaintiff enjoyed until obstructed as herein-after mentioned; that, in 1894, the National Bank sued the defendant Griffin and the plaintiff on a promissory note which the plaintiff alleged he had joined in only for the accommodation of the defendant Griffin, and it was then agreed between the defendant

Appeal.
1902.
SEXTON
v.
O'HALLORAN

Griffin and the plaintiff that the plaintiff should pay the amount of the said note and costs to the Bank, and that the defendant Griffin should assign the said "vacant plot" to the plaintiff; that in pursuance of the said agreement, the plaintiff paid the said note and costs to the Bank, and the defendant Griffin delivered possession of the said "vacant plot" to the plaintiff, but no deed of grant or assignment was executed; that all the defendants had notice of all the matters aforesaid, but, nevertheless, by deed 31st May, 1899, the defendants Griffin and Doherty purported to assign to the defendants Denis F. O'Halloran and Anne M. O'Halloran, his wife, in consideration of £117 10s., all the premises demised by the said lease of 1888, including the said "vacant plot," and the defendants Denis F. O'Halloran and Anne M. O'Halloran caused buildings to be erected on the said "vacant plot," and obstructed the plaintiff in his enjoyment thereof and his access to the premises demised by the said lease of 1863, and the equity civil bill prayed (amongst other things) specific performance of the said agreement between the defendant Griffin and the plaintiff, and the rectification or cancellation of the said deed of 31st May, 1899.

3. No statement or defence in answer to the plaintiff's civil bill was served on the plaintiff or filed by any defendant.

4. The said Denis F. O'Halloran was a natural born British subject. In 1888 he went to the United States of America, and there, in 1888, married his wife, the defendant Anne M. O'Halloran. There was no evidence of the nationality of the defendant Anne M. O'Halloran, but it was stated at the bar that said Denis F. O'Halloran had become a naturalized citizen of the United States of America, and that the said Anne M. O'Halloran was a natural born citizen of the United States of America.

5. In 1899 the defendant Denis F. O'Halloran came back to Ireland, and resided with his father in the said village of Mullagh until, in said year, 1899, his wife, the defendant Anne M. O'Halloran, came to Ireland with their four children, and she and her husband with their children then resided temporarily at a seaside lodge called Casino, which is also situate in the said division of Kilrush.

6. In 1900 said Anne M. O'Halloran returned with two of her children to, and has since remained in, the United States

of America, and after her departure her husband, the defendant Denis O'Halloran, continued to reside at Casino for some time, but then left it and went with his other two children to reside with his father and mother, James and Catherine O'Halloran, in the said village of Mullagh, where the said children, who were young and under twenty-one years of age, now are under the care of their grandmother, the said Catherine O'Halloran. The said Denis F. O'Halloran has since the said Assizes gone to America.

Appeal.
1902.

SEXTON
v.

O'HALLORAN.

7. At the sitting of the County Court held at Kilrush in June, 1901, the plaintiff applied *ex parte* for leave to substitute service on the said Anne M. O'Halloran of an equity civil bill which was then prepared and ready for issue. The application was grounded on an affidavit of Mr. Thomas Kelly, solicitor, sworn on the 6th June, 1901; but his Honour the County Court Judge refused the application, assigning as a reason (*inter alia*) that it was not stated in the said affidavit that the said Anne M. O'Halloran was a British subject.

8. Thereupon the present civil bill was issued against the defendants named therein, and was duly served upon the three defendants, Griffin, Doherty, and O'Halloran, all then resident within the jurisdiction of said County Court, and copies of said civil bill were also served on the said Catherine O'Halloran, and also on the said Denis F. O'Halloran, then within the jurisdiction of said County Court, directed to his wife, the defendant Anne M. O'Halloran. Plaintiff applied to his Honour the County Court Judge to deem this service good service on the said Anne M. O'Halloran, or alternatively to direct service by substitution or otherwise. The application was grounded on an affidavit of Thomas Kelly, sworn on the 6th June, 1901, and on a further affidavit sworn by him on the 16th October, 1901. His Honour held that the service was not good, and that the defendant Anne M. O'Halloran was a necessary party, and was resident outside his jurisdiction, and dismissed the equity civil bill. From this order the plaintiff appealed to the Judge of Assize.

The defendant Denis F. O'Halloran appeared by counsel on the said appeal. None of the other defendants appeared either in person or by counsel or solicitor; and for the said Denis F.

Appeal. O'Halloran it was contended that there was no jurisdiction to
 1902. entertain the said appeal, inasmuch as the defendant Anne M.
 SEXTON O'Halloran had not been served, and, therefore, was not party to
 v. O'HALLORAN said equity proceedings on the said appeal.

9. The following documents are to be taken as part of, and incorporated in, this case, viz.:—[The documents were here specified.]

10. The defendants Denis F. O'Halloran and Anne M. O'Halloran had not, nor have, nor has either of them, any place of business in Ireland, nor, except as before stated, any residence in Ireland.

11. The Judge of Assize affirmed the dismiss of the County Court Judge with costs.

12. On the application of counsel for the plaintiff, leave was given to the plaintiff by the Judge of Assize to appeal from his decision, and this case has accordingly been stated for His Majesty's Court of Appeal in Ireland.

The question for the Court is, Was the decision of the Judge of Assize correct in law?—and, if not, What order should be made in the premises?

Albert E. R. Joynt, for the appellant:—

This case raises the net question whether in equity suits within sect. 33 of the County Officers and Courts Act, 1877, the Irish County Courts have jurisdiction to serve (or to direct substitution of service upon) a defendant out of the jurisdiction. In the case of ordinary civil bills there was no such power. A sole defendant in an ordinary civil bill must be served with the process within and be resident within the jurisdiction of the County Court where he is sued. If there be more than one defendant in an ordinary civil bill, one of them must be so resident and served, and the other defendants may be served out of the county—*i.e.* in any other part of Ireland (14 & 15 Vict. c. 57, ss. 65, 69; 27 & 28 Vict. c. 99, s. 53). But with regard to the equity jurisdiction created by section 33 of the Act of 1877, it is expressly provided that “the civil bill Courts in Ireland shall, in addition to the jurisdiction now possessed by them, have and exercise all the powers

and authority of the High Court of Chancery in the suits and matters specified (s. 33).” A like provision is contained in almost the same words in the following section (s. 34), and the County Court Orders of 1900 (Order XXXVI., Rule 22) provide that where the ordinary civil bill practice is inapplicable, the enactments and practice relating to the Chancery Division of the High Court shall be followed. The mode of service in ordinary civil bills is prescribed by Order VI., Rule 5 (County Court Orders, 1900), and by Rule 4 of the same order service of the equity civil bill is to be effected in the manner prescribed for ordinary civil bills unless otherwise directed by the Judge, who may direct service to be substituted, or that service already had be deemed good service, as the case may be. By section 40 of the Act of 1877 equity proceedings under section 33 are to be brought—in mortgage suits, in the Court of the county where the lands are situate—in administration suits, in the Court of the county in which the deceased had his last place of abode or business, or where the executors or administrators of the deceased or any of them reside—in suits for specific performance, either in the Court of the county where the property affected is situate, or where the defendants or any of them reside—and in other cases the proceedings are to be taken in the Court within the jurisdiction of which the defendants or any of them reside. Thus, where land is affected, the appropriate tribunal is the Court of the county where such land is situated—whatever be the residence of the defendant or defendants: and it would in many cases render the jurisdiction useless if the absence out of Ireland of a necessary defendant made it impossible to join and serve him as a party so as to constitute the suit properly. In Osborne’s Jurisdiction and Practice of the County Court in Equity (p. 218) it is submitted that the County Courts in Ireland have jurisdiction to allow equity civil bills to be served out of the jurisdiction. This view of the law has been adopted by some County Court Judges.

If there be jurisdiction to order service out of Ireland upon a defendant in an equity civil bill, this is a proper case to exercise that jurisdiction within the Rules of Order XI. of R. S. C., 1891, or in which to direct service to be substituted. Having regard to the lapse of time, it may now be too much to ask for an order that

Appeal.
1902.

SEXTON
v.

O’HALLORAN

Appeal. the service already had be deemed good service ; but this Court can
 1902. direct service anew on the defendant, by substitution or otherwise.
 SEXTON As to the nationality of the defendant Mrs. Anne O'Halloran—
 v. O'HALLORAN she became upon her marriage, or is to be deemed to be of her hus-
 band's nationality, *i.e.* a British subject (Naturalisation Act, 1870,
 33 & 34 Vict. c. 14, s. 10). But this is a question which does not
 affect the jurisdiction to make her amenable in the suit, but is con-
 versant merely with the appropriate procedure, inasmuch as if she
 be a foreigner, notice of the process, and not the process itself, is to
 be served upon her.

There was no appearance for any of the defendants.

FITZ GIBBON, L.J. :—

This case raises an important question as to the jurisdiction of the County Courts in Equity. It would have been a sufficient reason for affirming the dismiss if the Judge of Assize had thought that it was a proper exercise of discretion by the County Court Judge. But if that had been his view, he should not have stated this case, and we must take it that the question intended to be submitted for our decision is, whether or not the power to serve an equity civil bill out of the jurisdiction exists. Nationality has little or nothing to do with it, but it is clear that Anne O'Halloran is the wife of a man who was a British subject, and has become a naturalized citizen of the United States ; the plaintiff alleges that the husband and wife are the assignees of a plot of ground in Clare, under a deed which this action is brought to rectify or cancel. The question, therefore, is whether a necessary party, out of the jurisdiction, the part-owner of property within the jurisdiction which is the subject-matter of the action, can be served out of the jurisdiction with the County Court process, in an equity matter relating to that property, after the process has already been served on a co-owner within the jurisdiction. In our opinion, the jurisdiction to serve the process upon a necessary party out of the jurisdiction is attracted by the subject-matter of the action being land within the jurisdiction, or being a contract made or to be performed within the jurisdiction, or by the service

of the process upon some other necessary party within the jurisdiction, in an action cognisable by the County Court.

It appears to us that the effect of the statute (40 & 41 Vict. c. 56, ss. 33 and 34), where the County Court has jurisdiction to deal with the subject-matter of the case, is to give to that Court every power of the High Court which is required to bring all the necessary parties before it. We must regard the decision of the Judge of Assize in this case as a decision that there was not this power, and we cannot affirm it.

We have not got evidence sufficient to justify an order deeming the service already had to be good service. In ordinary cases an order to substitute service would be convenient, and we are agreed that there is power to make such an order; but the circumstances of this case render it impossible to define any mode of substituting service which might not be open to objection, or to good cause being shown against it, for want of agency or the like. The only remaining course is to give liberty to the plaintiff to serve notice of the civil bill on the defendant Anne O'Halloran out of the jurisdiction. The service must be personal, and it ought to be possible to effect it within two months. The order dismissing the civil bill will be discharged, and the case adjourned to the next Easter Sessions; to be then proceeded with, upon proof of service upon Anne O'Halloran; if she has not then been served, or if, having been served, she desires further time, either party can apply to the County Court Judge for such order as the circumstances may require.

Appeal.
1902.

SEXTON
v.
O'HALLORAN
Fitz Gibbon,
L.J.

WALKER and HOLMES, L.JJ., concurred.

Solicitor for the appellant: *Thomas Kelly*.

G. Y. D.

M. R.
1903.

CONOLLY v. BARTER.

June 10, 11, 12, 24. *Tenant for life and remainderman—Payment by tenant for life of charge on inheritance—Release of lands—Merger—Erroneous belief—Presumption of intention to keep charge alive—Expression of intention.*

Appeal.
1904.

Jan. 27, 28.

A tenant for life of real estate paid off a charge on the fee, and took an absolute release of his estate in the lands, with the intention of extinguishing the charge, under an erroneous belief that he was owner in fee of the lands. He subsequently became aware that he was only tenant for life, and he consulted his solicitors, with the view (if possible) of keeping the charge alive for his own benefit, and a case was sent to counsel in reference to the matter, who advised proceedings in Chancery, which, however, the tenant for life declined to bring. He made no mention of the charge in his will. There was conflicting evidence as to various expressions of his intention, made subsequent to the payment off of the charge. After his death his executors brought an action to raise the charge as portion of his assets :—

Held, that, notwithstanding the release of the lands and the other circumstances of the case, the tenant for life was entitled, on discovering his error, to keep the charge alive against the inheritance, and that his subsequent acts and declarations sufficiently evidenced that intention.

TRIAL OF ACTION.

The plaintiffs asked for a declaration that a charge of £1200 was a valid and subsisting charge on certain lands, and that they, as executors of John Barter, deceased, were entitled to a sum of £800, portion of said charge, and that payment of same with interest might be enforced by sale or mortgage of the lands, etc.

The circumstances of the case and the questions arising for decision are sufficiently stated in the judgment of the Master of the Rolls.

Matthew J. Bourke, K.C., Hennessy, K.C., and Sheehan, for the plaintiffs.

O'Connor, K.C., Conner, K.C., and Jefferson, for the defendant John W. Barter.

THE MASTER OF THE ROLLS:—

M. R.
1903.CONOLLY
v.
BARTER.

June 24.

This action is brought by the Rev. John Quarry Conolly, and Mr. William Henry Garde, as plaintiffs, and they sue as administrators of Mr. Thomas Barter, and as executors and trustees of Mr. John Barter. The defendants are Mr. John W. Barter, and Messrs. James Splaine, Christian Masters, and Margaret Mulholland.

The action is brought for a declaration that a charge of £1200 is a valid and subsisting charge on certain lands, and that plaintiffs, as executors of John Barter, deceased, are entitled to £800, portion thereof, with interest thereon from the death of John Barter, and that payment of said £800 and interest may be enforced by sale or mortgage of the lands, and for consequential relief.

The facts, so far as material to the plaintiffs' case, appear from the statement of claim. It seems that Thomas Barter made his will in 1849, and thereby devised and bequeathed the lands of North and South Droumcarra, and other denominations of lands, and all his other lands, wheresoever situate, unto trustees upon trust, subject to an annuity for his widow, out of the yearly rents, issues, and profits, or by sale, demise, or mortgage for any term of years not exceeding 500, to raise and levy the sum of £1200 (which is the charge in question), and pay same to his daughters Susan, Mary Anne, and Christiana, in equal shares, on their attaining twenty-one, or marriage, with interest in the meantime at 6 per cent., and subject to said sum of £1200 to the use of his son John Barter (whose executors are the plaintiffs) for his life, with remainders over, the first of which remainders is "to the use of his first and other sons in tail male successively," and under these limitations the defendant John W. Barter entered, and is in possession of the lands. By a codicil to his will the testator directed that the sum of £1200 should be equally divided among his four daughters, Susan, Mary Anne, Christiana, and Frances, and by a second codicil he revoked this disposition, and directed the trustees to pay the sum to his three daughters, £400 to Mary Anne, £400 to Christiana, £400 to Frances, to the exclusion of Susan altogether, subject to the conditions and

M. R.
1903.
CONOLLY
v.
BARTER.

payable in the manner mentioned in his will, with the benefit of survivorship, and he revoked all limitations over contained in his will of lands so far as Susan, her children, and heirs were concerned, but in all other respects confirmed the limitations in his will. He died in 1864, and a grant of administration with will and codicils annexed was, on 20th December, 1901, granted to the plaintiffs, the executors named in the will having died. The testator left his son John and four daughters surviving him. John, on the death of his father, entered into possession of the lands as tenant for life, and continued in possession until his death on 25th March, 1901. The testator's daughter Mary Anne attained age and married, and died in 1901, without issue. Christiana married Mr. W. H. George, and died in 1898, leaving the defendant John W. Barter, otherwise George, her only child, surviving. Frances died unmarried, and under twenty-one, in 1873.

Mary Anne Barter having attained the age of twenty-one, by deed dated 12th July, 1865, mortgaged her legacy of £400 to James Boyd to secure the repayment of £200, with interest at 6 per cent. That mortgage became vested in two gentlemen, who, by deed dated 24th October, 1879, assigned the legacy and charge to Philip Splaine as trustee for John Barter. The balance of that legacy of £400 was paid by John Barter to Mary Anne Barter, who, by deed of 3rd May, 1871, released him and said lands from all claims by her in respect thereof.

With the consent and approval of Christiana Barter her legacy of £400 was paid by John Barter to her husband, W. H. George, and George and his wife released John Barter and the lands from all claims in respect of the legacy. It is averred in the statement of claim that John Barter paid off these legacies as tenant for life, with the intention of preserving and keeping same alive for his own benefit, and not with the object of relieving the inheritance from the burthen thereof. On the death of Frances under twenty-one, her share of the charge of £1200 became vested in William Henry George, in right of his wife Christiana, and Mary Anne, in equal shares, and they, with the concurrence of John Barter, assigned the legacy and the benefit of the charge to Charles Ross Munro, who, in consideration of the payment to

him by Robert Shaw and George Bolster of £400, at the request of John Barter, by deed of 17th June, 1886, assigned the said legacy and the benefit of all securities therefor to Robert Shaw and George Bolster, and by that deed John Barter covenanted to pay the sum of £400, with interest at 6 per cent., and the sum of £400, and the benefit of all securities therefor was, by deed of 17th December, 1900, supplemental to the indenture of 17th June, 1876, assigned to Charlotte Elizabeth Newman, and is now vested in her. John Barter, by his will dated 13th March, 1901, devised and bequeathed all his real and personal property of every kind whatsoever to the plaintiffs as trustees upon trusts, and the first trust was for Miss Abigail Splaine for life, with remainder for charitable objects. He died without altering his will on 25th March, 1901. On John Barter's death the defendant John W. Barter, the son of his sister, entered into possession of the lands, and still continues in enjoyment of them. He is unmarried. William Barter, the ultimate devisee of the lands in fee under the will of Thomas Barter, died in 1864, without purporting to dispose of his interest (if any) in the lands.

Under these circumstances the plaintiffs contend that the charge of £1200 is a valid and subsisting charge on the lands, and that £800, portion thereof, is now vested in them as executors of John Barter. The defendants traverse this and say, that is the defendant John W. Barter says:—"The said John Barter in his lifetime distinctly stated on several occasions that it was his desire and his object in paying off the said charges to relieve the inheritance and fee of the said lands from the burden of the two charges of £400, payable respectively to Mary Anne Barter and Christiana George."

The question in the case is whether the charges, or any of them, have been merged in the inheritance, or whether they remain alive, and are the property of the tenant for life, whose money paid them off. This is, speaking generally, a question of intention; but the present case presents this peculiarity, that at the time when John Barter paid off the legacies he supposed himself to be the owner in fee of the land, of which he was, in fact, only life tenant. It was urged on the part of the principal defendant (whom I shall call the defendant) that the proof of the existence

M. R.

1903.

CONOLLY

v.

BARTER.

M. R.
1903.
CONOLLY
v.
BARTER.

of this mistake was inadequate ; but there can be no doubt that he was ignorant of his title. The cases to counsel, to which I shall afterwards refer, prove it ; and indeed if it were not so, and if he knew he was only tenant for life, the plaintiffs' case would be obviously much strengthened on the question of intent. His ignorance of the terms of his father's will is no doubt strange ; but it is to some extent accounted for by the fact that it disclosed a painful circumstance affecting the *status* of some of the family, and was deliberately kept out of sight ; and that he was ignorant is impossible to question, having regard to the statement in the case to Mr. (now Mr. Justice) Johnson, prepared by Messrs. Babington (defendants' solicitors), and submitted in 1876. That case contains the statement that Mr. Barter was "under the belief that he was absolute owner, and not merely tenant for life," and that he was "desirous if possible to remedy what he had done in error, so as to keep alive the two charges." It is this circumstance which raises the chief difficulty in plaintiffs' way, for it is much more difficult to infer an intention to keep charges alive by an owner in fee than by a life tenant, the question of interest being usually absent. In the case of a tenant for life, his interest is obvious ; and if he, knowing himself to be such, pay off charges affecting the inheritance, he need say nothing and do nothing ; they become his, and are, therefore, kept alive for his personal representatives. And indeed this is absolutely right. If a stranger bought up a charge on an estate in settlement, he would take it as it stood ; and if a tenant for life pays it off, should he be in a worse position ? Apart from the legal doctrine of merger, it is impossible to answer the question in the negative, provided, of course, no purchaser of the estate for value and without notice intervenes. These are elementary propositions. If, then, John Barter had known of his real title, nothing more would need to be said, unless he had clearly indicated an affirmative intention that his money should be dedicated to the uses of the settlement, which would require very clear and cogent proof.

Is, then, the fact that when he made the payments he was under a mistake as to his title, sufficient to displace this presumption ? By itself it clearly would not. The presumption would be as if he had known his true title and acted accordingly.

In *Burrell v. Earl of Egremont* (1), the leading case on this subject, a very similar question arose, the tenant for life having paid off charges in ignorance of the rights he possessed in reference to them. Lord Lyndhurst says, at page 231 :—
 “He was ignorant that the additional portions were properly and primarily chargeable on the real estates, of which he was tenant for life; and the nature of the charge being unknown, and unalluded to in the deeds, they contain no indication whatever of intention either to continue the charge or exonerate the estate. In this case there is no evidence whatever, except that which may be derived from the execution of the several deeds which have been stated, and as it does not appear from those deeds that Earl George knew his rights, it cannot be collected from that he intended to waive or in any way relinquish his rights.” And he says (p. 233) :—“It may be true that if Earl George had known the nature of the charge, and that he might have raised it for his own benefit, he might have thought fit to exonerate the estate; but this is no more than conjecture, and in the absence of sufficient evidence it cannot countervail a legal presumption, and I am under the necessity of concluding that Earl George did not, by his acts, upon payment of the portions, exonerate the estates from the additional portions charged thereon by the will of Earl Charles, and that after the payment of the portions in the year 1781, Earl George was entitled to have the amount raised for his own benefit.”

M. R.
 1903.

CONOLLY
v.
BARTER.

This was not exactly the point which arose in *Lord Gifford v. Lord Fitzhardinge* (2), before North, J. In that case a tenant for life was living at the time, and he brought his action for the purpose of having a transaction rectified, and of having a declaration that he was entitled to have a charge kept alive for his own benefit. He had directed the mortgagee's solicitors to prepare the necessary deed, but omitted to inform them of the existence of the marriage settlement, and that it was not his intention to extinguish the mortgage debt for the benefit of the capital of the settled funds, and accordingly the solicitors prepared the instrument of reconveyance to the tenant for

(1) 7 Beav. 205.

(2) [1899] 2 Ch. 32.

M. R.
1903.
CONOLLY
v.
BARTER.

life as if he were absolute owner. North, J., says :—“ I accept the plaintiff’s statement that he did not intend to pay off the mortgage debt for the benefit of the settlement, but that he intended to pay it for his own benefit. The effect of the conveyance as it stands is, that the mortgage is paid off for the benefit of the settlement, and something must be done to neutralize that effect. I think the best plan will be to follow *Burrell v. Earl of Egremont* (1), and to make a declaration that, notwithstanding the form of the reconveyance, the plaintiff, as tenant for life, having paid off the mortgage debt out of his own moneys, became and is now entitled to have the charge kept alive for his own benefit, and that the sum of £1000 secured by the mortgage now constitutes a charge upon the property having priority over the settlement. The plaintiff must pay the costs of the action.”

The release of the lands was much pressed as conclusive proof of the intention of John Barter to exonerate the inheritance once and for all. But in any event a release of the lands was necessary, so far as his estate in them was concerned ; and the release must be deemed to have been intended to be co-extensive with that estate. It could not legally extend beyond that, and the mistake was an integral part and element of the transaction, so that the release was no more than a carrying out in express words of what was deemed to be the natural effect of paying off the charges. It was, too, a release by the owner of the charges, though in a deed to which he was a party ; and undoubtedly did release his estate in the lands.

But this point, too, is covered by the authority of *Burrell v. Earl of Egremont* (1). The Master of the Rolls says (reciting the settlement) :—“ And the said Henry Herbert acknowledged the receipt thereof, in full satisfaction of the original and additional portions of the Lady Elizabeth, and of all claims and demands in respect thereof, upon the estates, real and personal, of Earl Charles, or upon the Dowager Countess and the Earl of Thomond or either of them, and Henry Herbert released them, and all and singular the estates, real and personal, of Earl Charles, from the same, and

covenanted to do any other act required for further releasing the same, and better extinguishing the same sums of money and all claims of Henry Herbert and Lady Elizabeth by reason thereof, or upon the estates of Earl Charles"; and then, at p. 231, he says:—"He was ignorant that the additional portions were properly and primarily chargeable on the real estates, of which he was tenant for life; and the nature of the charge being unknown, and unalluded to in the deeds, they contain no indication whatever of intention either to continue the charge or to exonerate the estate."

In *Lloyd's Estate* (1), Ross, J., says:—"If my decision were to depend upon the intention of the owner at the time he bought in the charge, I should not hesitate to find that the charge had never merged. It was for his advantage to have it kept alive, there being other charges puisne to it. He was a limited owner, and the assignment was made to a trustee. This, however, carries me a very short way indeed. The fact that the assignment was made to a trustee is a strong argument against merger, but is by no means decisive"; and he quotes the words of Lord Romilly in *Hood v. Phillips* (2):—"I am of opinion that the presumption arises on the death of the person who is entitled to both the estate and the charge, and that this intention is to be collected from all the circumstances which existed at that period. All the acts of the person so entitled prior to his decease must be taken into account for the purpose of ascertaining his expressed intention, if any such exist, and all the facts affecting his position down to and at the time of his decease must also be taken into consideration for the purpose of ascertaining from them the intention of the testator." I need not follow the judgment further, because Ross, J., held that the testator in the case had clearly manifested an intention to merge the charge in the inheritance.

I take it, therefore, that the case depends upon evidence: and Mr. O'Connor at once accepted the onus of proving that, as matter of fact, John Barter intended to extinguish the charge and leave the estate for the remainderman under his father's will free from them. Such proof in cases of this sort is always

M. R.
1903.

CONOLLY
v.
BARTER.

(1) [1903] 1 I. R. 144.

(2) 3 Beav. 513.

M. R.

1903.

CONOLLY

v.

BARTER.

admissible, and acts or words of the tenant for life, even after the event, being against interest, are legitimate evidence. I must refer to the several witnesses in some detail.

The first witness was Miss Abigail Splaine; she was first cousin of the deceased John Barter. He came of age about 1867, and she went to keep house for him in 1891, and remained there till 1901. She says:—"He spoke to me about the legacies—Chrissie's (Christiana's) and Mary Anne's—more than once. It was the first night I was there that he asked me to remain. I said I could not afford it. He told me that while he lived I should have half of any loaf, and at his death everything he had; and he mentioned specially these charges of £400 for Mary Anne, and £400 for Chrissie. He said they were his property, and they had gone to America." Again she says:—"Philip, my brother, was a great friend of John Barter's. He spoke to him many times about the charges. He said it was his opinion he could raise the charges at any time. That he had taken counsel's opinion. That it was his to do with as he pleased. He said it was a very good investment for his money. He said it was better to pay it out of his own pocket than leave it as a charge upon the property. That he escaped interest money. He always spoke of this special money as a help for his old age." On cross-examination she said:—"I went on a visit in 1891. He conveyed to me that he would leave to me the £1200. It was a common subject of conversation, always present to his mind. He said there will be a great deal to leave—that was the money now under discussion. No mistake, he mentioned it over and over again."

The next witness for the plaintiffs was the Reverend Mr. Conolly, rector of the parish. He knew the deceased, who was in his parish, but he knew very little about his family affairs. He told him that he was going to leave his interest in the charges to Miss Splaine for life, and that he would leave the principal in charity. He says, "I said to leave it to charity in his own parish, and he said he would do so. He said there was no one he wished to leave anything to."

This, with the documents, including the cases to counsel (one to Mr. Johnson, the other to the late Mr. Mark O'Shaughnessy),

and the draft statement of claim prepared by the latter, formed the plaintiffs' case.

The first witness for the defendant was Mr. T. J. Babington, solicitor, whose firm were the family solicitors of Mr. Barter. He said that he carried on business in succession to his father, and was well acquainted with Mr. Barter. In 1876 he submitted a case to Mr. Justice Johnson for Mr. Barter, and in 1881 to Mr. O'Shaughnessy. He mentioned a conversation that took place in the office. The case was read over and explained to Mr. Barter. He said he did not wish to go any further. That it would be no benefit to him. That he had plenty of money. He says, "I drew the bill of costs and he paid them. He was in the office afterwards. There was an old charge of £3000 on the property, £1000 obtained as a sub-mortgage. He always spoke of the charges as 'what was on it.' He said the '£3000 is a sufficient incumbrance on it,' and that he wished to leave it as clear as he could for those who would come after him."

M. R.
1903.

CONOLLY
v.
BARTER.

He was cross-examined by Mr. Hennessy. He said, "I do not think he (Mr. Barter) said anything about the costs as a reason for not taking proceedings. I do not remember that he said that he would not go on in consequence of the costs." Mr. Justice Johnson had advised that if he took proceedings, and even if he were successful, he would probably have to pay the costs of the other side.

"My recollection," he said, "is quite clear, though I have no memorandum," referring to the interview at the office when Reverend Mr. Conolly and Ashe were present, and the conversation that took place when O'Connor refused to be cross-examined. He says, "I do not remember his saying about 'fear of costs.' He was not deterred from taking proceedings by fear of costs."

He said, "I knew Philip Splaine. He came to the office immediately after the death of Mr. Barter. The case to Mr. Johnson was at the office at the time. I did not prepare the case myself, but I knew of its preparation. I did not take the instructions. On October 6th, 1878, the case was returned. I read it"; and then he makes this extraordinary statement: "John

M. R.
1903.
CONOLLY
v.
BARTER.

Barter always knew his tenure of the lands. He intended to benefit himself. He believed he was not tenant for life, but that he was owner in fee." The case of 1880 repeats the same statement as that in the previous one. "What he said was that he was decided not to go on with the action after 1881."

"In my office he expressed this intention." In reference to the discovery of documents he says, "When asked, I said nothing about the cases. All those papers were of importance. I had forgotten about them."

That is an astounding statement for him to make. He said, "The affidavit of documents was prepared by O'Connor. I did not remember these documents at the moment. I remembered it (the case to Mr. Johnson) when I was called upon to disclose it. I met Mr. Exham in the street; he told me that Mr. Splaine had told him that Ashe knew I had the documents. I said I would look into the material ones. He said there was an old case that was sent to counsel. I think I had two conversations with Exham. I said I would look; that I believed there was an old case to counsel. Exham saw me a fortnight afterwards. He said it would be a serious thing if it was not disclosed." And a fortnight afterwards he did disclose it. He says, "John Barter often spoke of things in the office. He referred to the people in America, and said the estate was small enough to go to them."

That is practically the whole of his evidence.

Mr. O'Connor, the managing clerk of Mr. Babington, was called. He says:—"I recollect the case to Johnson and O'Shaughnessy. I saw Barter in reference to the case. I explained to him his position; he said, 'What is the use of keeping them up? I won't want the expenses. Let them that come after me have the benefit.' I pointed out to him it would be an advantage to keep them alive in case of his getting married. He said what was the use; that he would never get married. He said it would go to Chrissie's children. I saw Barter frequently, till a month previous to his death. He was anxious to purchase a middleman's interest in his own property. Divil a word he said more about these charges." He was cross-examined by Mr. Bourke. He says, "I had it in 1880, when I prepared the case for O'Shaughnessy. From 1876

till 1880, the case might be in letter B." He says—"Mr. Babington was present at the conversation with Mr. Barter, and when Mr. Barter was asked about the proceedings he said they were not going on. I think he said it was to avoid the trouble. To my knowledge I never heard him refer to the Georges."

Then he was cross-examined as to the interview with Rev. Mr. Conolly and Ashe. He said, "I was called in; I was on my guard. It was a fishing expedition. I told Mr. Babington to answer no more questions. I said, 'Let them put them in writing.' There was nothing about a quarrel with the people in America." Then he says, "I prepared the case for counsel lately. I prepared the affidavit of discovery. I knew the documents were in existence, but I did not know the dates. I thought it was a private document as between solicitor and client."

That is the substance of his evidence.

The next witness was Denis Lehane. He states that he is a merchant tailor, and that he knew the deceased John Barter from infancy. He sometimes spoke to him of private matters. "In his last illness," he says, "I went to see him before he went to hospital; he mentioned to me the estate would go to Chrissie's son George. He said, 'it is my wish that it should go with the least incumbrance.' I saw Mrs. George and her children at Droumearra over twenty years ago."

There is not very much in that; but he said on cross-examination—"I believe he said that if he wished he could charge the estate with a sum, but that he did not wish to do so."

The next and last witness to whose evidence I shall refer at any length was Patrick Buckley. He had been steward to the late Mr. John Barter; he saw him six months before his death, and he says he told him that he was after going to a lot of trouble about his property, that he was after paying off a lot of money, and that it was all for those people in America. He says that he improved the place very much, till he died, that he reclaimed it and put up buildings, and said it was for the benefit of his sister's children. And he says, "I saw only a few letters lately, the last about six years ago; I have the whole place taken from John W. Barter, the defendant. I was steward for fifteen or sixteen years. He never

M. R.
1903.

CONOLLY
v.
BARTER.

M. R.
1903.

CONOLLY
v.

BARTER.

told me he intended to do anything for Miss Splaine: quite the contrary. He had his senses fairly well about him; he said he would leave her nothing." He then mentions going to the Bank on an occasion to take some trout to the manager. He says—"John Barter said that he had been improving the place and doing a lot of work for those d——d Americans"; and then being asked about the interview with Garde, a most respectable witness, he made a statement, which appears to me to be a falsehood, that Garde wanted him to swear a false oath.

Then he says, "In January before he died, he said that he was after going to a lot of expense, and that they would be coming across and getting the benefit of it."

Mr. John William Barter was examined, but he knows nothing about the matter.

There is another episode to which I should refer. Buckley gave some information in reference to a letter from America from Mrs. George to Miss Splaine. It appears to have fallen into the hands of Buckley, and he kept it for years, at least it was not disclosed, and he apparently kept it for the purpose of showing the intimacy that existed between these people. It was not intended for him to read. I accept Mr. Conner's suggestion that there may not have been anything more than what would be considered bad taste among people of a higher *status*, and that the affair is not to be treated in the same way in the case of persons occupying a humble position of life. There may be nothing more in the matter itself, but it seems to me that the transaction showed a partizan spirit on the part of Buckley, and the entire of his evidence corroborates that view, and consequently I could not act on it except so far as it is supported by reliable evidence. The Rev. Mr. Conolly was recalled and stated that O'Connor told him that he had some kind of a quarrel with the people in America, and that he did not want to do anything for them. As between him and O'Connor I have no hesitation in accepting the statement of Rev. Mr. Conolly, who has no interest in the case, and he says distinctly that he was told by O'Connor that the deceased had some kind of a quarrel with his relations in America. But Garde was called in reference to what Buckley stated in reference to an interview with him. He stated that he (Buckley) said to him that

Mr. John Barter said that he would leave nothing to those d——d Americans. The very phrase Buckley used in his evidence, and which he said was what Garde wanted him to state, and, according to Garde's evidence on cross-examination, Buckley made a very strange statement to him:—"He said he would deny on oath that he had made the statement."

M. R.
1903.

CONOLLY
v.
BARTER.

That is the whole evidence in the case, so far as it is important in reference to the matter to be decided. The result of the evidence is, on the whole, entirely in favour of the plaintiff's contention. The testimony of Abigail Splaine may be discounted by the fact that she has an interest. So to a certain extent may the same be said of that of the Rev. Mr. Conolly, because he is a plaintiff in the case, though without a particle of pecuniary interest. But the statements of John Barter himself, reduced to writing and intended to be acted on, and presented to counsel for that purpose, are of enormous weight if there be a conflict as to oral utterances by him.

But the evidence for the defendant is not alone vague and ambiguous, but it is something worse.

When Mr. Babington and his clerk came up to swear to conversations, in which the alteration of a word would make all the difference, I cannot forget the astonishing circumstance that each of them was in a sense, and O'Connor most directly and personally, a party to the preparation of the two cases in question; that each of them was privy to the instructions for them given by John Barter, and that both cases and Mr. O'Shaughnessy's draft statement of claim were in their office at the time when the affidavit of discovery was made omitting them altogether; that it was a cautionary reminder by Mr. Exham which brought them to light, but not till after the reminder was repeated, with a salutary warning that plaintiff's solicitor knew something about it.

Now this business about the preparation of the cases happened a long time since: and it is possible that Mr. Babington may have forgotten it, though it is difficult indeed to believe that under all the circumstances. O'Connor admits he remembered about the case when preparing the affidavit, but forgot the dates. O'Connor was not in the most favourable condition for giving evidence

M. R.
1903.

CONOLLY
v.
BARTER.

when in the witness box, but not so as to incapacitate him from giving testimony.

Supposing then that Mr. Babington forgot all about the preparation and existence of these most important papers, prepared when he was the confidential solicitor and adviser of John Barter, what is to be said of his memory? Can I trust him or O'Connor as to their verbal accuracy in reference to conversations of which no scrap of written record remains, when all these professional matters had absolutely slipped away from them?

In either view of their evidence, it is not to be too fully credited on this point, and as to a conversation which happened the other day, they are contradicted by the Rev. Mr. Conolly, whom I entirely believe.

Then the merchant tailor Lehané (I do not know what the word merchant imports) had very little to say, and that of an ambiguous character at best. Buckley was not a witness whose evidence, if uncontradicted, I should have placed much reliance on. His retention of the letter of February, 1897, from Mrs. George to Miss Splaine, I have already referred to as showing bias in the case. But it was not uncontradicted.

I have come to the conclusion, as matter of fact, that John Barter paid off these charges under the belief that he was owner in fee; that when he discovered his true position he was most anxious to keep the charges alive, and twice consulted counsel how to do so; that he could have taken legal steps to secure the money for himself by a decision in Court, but that he was afraid of incurring the expense, being advised that he must bear all his own costs, and would probably have to bear those of the other side, even if (as he was told he would) he should succeed in the case. This fear of costs kept him inactive, and may have led him to abandon the idea of taking action himself in the matter. I do not believe that he ever expressed to anyone the intention of letting the charges sink into the inheritance for the benefit of the "people in America." The statements to that effect are either concocted or perverted versions. He did say that he did not care about any of them, and he left nothing to them in his will, his whole estate going ultimately to charity.

As to the fact that John Barter took no action, I have given

the real reason, and it must be remembered that it was not necessary for him to take any action whatever, assuming that he desired, when he knew his rights, to preserve the money as part of his personal estate.

There is no case exactly like the present, where the original transaction having been effected in error, on the discovery of the error the credible evidence—I mean the only evidence on which one could act—is all the one way as to the man's real wishes and intentions. Was it too late for him to remedy, if it needed a remedy, what he had done, when he found his true position? Clearly not. If nothing were known at all of his state of mind, the law would draw the inference from the facts, and *Burrell v. Earl of Egremont* (1) shows that the inference will be drawn, notwithstanding the belief by the Court that a different, though mistaken, intention actually existed: and when the mistake was discovered Barter indicated as clearly as man could his desire to rectify it, though he was frightened by the cost of what, after all, would have been little more than a bill to perpetuate testimony. Had he known that, saying nothing, doing nothing, the charges were his when he paid them off; had he, in short, let nobody know that he had thought himself absolute owner, every legal presumption would have been in his favour.

And it is because the defendant's counsel felt and knew this, that Mr. O'Connor commenced by expressly admitting that the *onus* was on him, and undertaking to prove that John Barter had deliberately expressed his election to merge the legacies. That there was *some* evidence to support this view is not to be denied; but I have dealt with it, and it fails altogether to satisfy me that at any time or to any person he indicated an intention definitely to give up his undoubted rights to these relatively large sums of money, which were his. Any expressions which may have been used by him indicating an intention to leave the place in good plight and condition to those who would come after him (if any such were in fact used) would be capable of being applied to the very considerable improvements he had undoubtedly made upon the property. Nothing short of a very clear indication could countervail the statements in the cases to counsel.

M. R. If my view of the facts be correct, it is not necessary to consider
 1903. the bearing of such cases as *Swinfen v. Swinfen* (1); *Lysaght v.*
CONOLLY *Lysaght* (2); and *Godley's Estate* (3).
v.
BARTER.

R. W. L.

Appeal. The defendant John W. Barter appealed to the Court of
 1904. Appeal.
 Jan. 27, 28.

O'Connor, K.C., and *Conner, K.C.* (with them *Jefferson*), in support of the appeal, cited the following cases:—*Lysaght v. Lysaght* (2); *Burrell v. Earl of Egremont* (4); *Lindsay v. Earl of Wicklow* (5); *Morley v. Morley* (6); *In re Godley's Estate* (3).

Ronan, K.C., *Matthew J. Bourke, K.C.*, *Hennessy, K.C.*, and *Sheehan*, for the respondents, were not called on.

Jan. 28. The Court of Appeal (FITZ GIBBON, WALKER, and HOLMES, L.JJ.) affirmed the decision of the Master of the Rolls.

Solicitor for the plaintiffs: *C. W. Ashe*.

Solicitors for the defendant John W. Barter: *T. Babington & Son*.

G. Y. D.

(1) 29 Beav. 199.

(4) 7 Beav. 205.

(2) 4 Ir. Jur. 110.

(5) I. R. 7 Eq. 192, at p. 209.

(3) [1896] 1 I. R. 45.

(6) 5 D. M. & G. 610.

IN RE LAHIFF, A PERSON OF UNSOUND MIND (1).

Lunacy.
1903.*Renewable Leasehold Conversion Act (12 & 13 Vict. c. 105, ss. 1, 17, 35)—*

Jan. 21.

*Owner a lunatic so found—Fee-farm grant—Execution by committee alone
—Receiver—Jurisdiction in Lunacy matters.*

Where the owner of the reversion expectant on the determination of a lease for lives renewable for ever has been found lunatic, and a receiver and a committee of his estate appointed in the Lunacy matter, the committee alone is the proper party to execute a fee-farm grant under the Renewable Leasehold Conversion Act in lieu of the lease.

Nature of the jurisdiction in Lunacy explained.

MOTION on the part of John Boland, who was owner of the lessee's interest under a lease for lives renewable for ever (the reversion on which was vested in the lunatic Thomas Edward Lahiff), that P. C. Trench, the receiver in the Lunacy matter, should join with James Lahiff, the committee of the estate of the said lunatic, in executing to the applicant a fee-farm grant under the Renewable Leasehold Conversion Act in lieu of the said lease.

P. C. Trench had been appointed receiver in the Lunacy matter by an order dated 17th September, 1895.

By an order made in this matter on 24th July, 1902, upon the petition of the committee of the lunatic, liberty was given to the committee to execute a fee-farm grant to the said John Boland of the premises comprised in the said lease. The draft fee-farm grant was then prepared by the lessee's solicitor, and furnished to the solicitors of the committee. The draft as prepared did not make the receiver a party to the deed. The draft was then submitted, as directed by the order of 24th July, 1902, to Mr. Frederick Fleming, K.C., to settle and approve on behalf of the Court. Mr. Fleming settled and approved of the draft, placing the following note in the margin:—"Under sections 17

(1) Before LORD ASHBOURNE, C., and FITZ GIBBON, WALKER, and HOLMES, L.JJ.

Lunacy.
1903.

In re
LAHIFF.

and 35 of the Renewable Leasehold Conversion Act this grant must be made by the committee of the lunatic's estate and the receiver who is in actual receipt of the rent of the property jointly, in order that a valid grant may be made within this statute." The Registrar in Lunacy thereupon directed that a joint opinion should be obtained from Mr. Fleming and the counsel for the committee. Counsel for the committee, however, was of opinion that the practice which hitherto prevailed in Lunacy matters of making fee-farm grants on behalf of a lunatic through the committee of his estate alone was the correct practice, and Mr. Fleming adhered to his original opinion expressed in the above-mentioned note.

The question was then brought on motion before the Lord Chancellor, who adjourned the matter in order to have it heard before himself and the Lords Justices, to whom, along with the Lord Chancellor and the Master of the Rolls, in accordance with sect. 4 of 1 Edw. 7, c. 17, the letter under the sign manual of the King had been directed (1).

(1) The following is a copy of the letter :—

EDWARD, R.

Right trusty and well-beloved Councillors, We greet you well.

Whereas it belongeth to Us, in right of Our Royal Prerogative, to have the custody of Idiots and their estates in that part of Our United Kingdom called Ireland, and to take the profits thereof to Our own use, finding them necessities, and also to provide for the custody of Lunatics and their estates in that part of Our said United Kingdom called Ireland, without taking the profits to Our own use.

And whereas, considering that Writs of Enquiry of Idiots and Lunatics are to issue out of Our Court of Chancery in that part of Our said United Kingdom called Ireland, and the Inquisitions thereupon taken and found are returnable in that Court, We have thought fit to entrust you with the care and commitment of the custody of the said Idiots and Lunatics and their estates.

And We do by these Presents give and grant unto you full power and authority, without expecting any further special Warrant from Us, from time

The Lord Chancellor of Ireland, the Master of the Rolls, and the Lords Justices of Appeal in Ireland, to give order for granting and committing the custody of persons and estates of Idiots and Lunatics in Ireland.

The motion now came on for hearing.

Herbert Wilson, K.C., and Horan, for the applicant:—

Section 1 of the Renewable Leasehold Conversion Act provides that the “owner” is to execute the fee-farm grant. Section 35 declares that certain persons having certain estates in the lands shall be deemed owners for the purposes of the Act. The estate possessed by the lunatic in this matter undoubtedly would qualify

to time by order and without grant passed under Our Great Seal, as formerly, to grant and commit the custody of such Idiots and Lunatics and their estates as are and shall be found by Inquisition thereof, taken or to be taken and returnable in Our Court of Chancery in that part of Our said United Kingdom called Ireland, to such person or persons, suitors in that behalf as, according to the rules of law and the use and practice in these and the like cases, you shall judge meet for the trust.

The said grants and commitments to be made in such manner and form as hath been heretofore used and accustomed, and to contain such apt and convenient covenants, provisions, and agreements on the part of the committee and grantees to be performed, and such security to be given by them as shall be requisite and useful.

And We do declare Our will and intention to be that the several powers which We have hereby given and granted shall and may be exercised by you, or any two or more of you acting or sitting together, or by any one of you alone acting or sitting separately.

And for so doing this shall be your warrant.

Given at Our Court at Sandringham the 2nd day of December, 1901, in the First year of Our reign.

By His Majesty's command.

W. H. FISHER.

H. T. ANSTRUTHER.

To

Our right trusty and well-beloved Councillor,
EDWARD, BARON ASHBOURNE, Our Chancellor of that part of Our United Kingdom called Ireland;

Our right trusty and well-beloved Councillor,
ANDREW MARSHALL PORTER, Master of the Rolls of Ireland; and

Our right trusty and well-beloved Councillors,
GERALD FITZ GIBBON, SAMUEL WALKER,
and HUGH HOLMES, Ordinary Judges of Our Court of Appeal in Ireland.

Lunacy.
1903.

In re
LAHIEFF.

him within this definition, if not under disability, to execute the grant; but section 35 concludes with the proviso that when any person not being the "owner" is in receipt of the rents payable by the tenants of the lands as receiver under any decree or order of a Court of Equity, he shall jointly with the person, who but for such receipt would be deemed the "owner," be deemed the "owner" for the purposes of the Act. The receiver and the lunatic are, therefore, jointly to be deemed the "owner," and must both execute the grant, the execution by the lunatic being provided for by section 17, which enacts that in such cases the committee is to be substituted for the lunatic. It follows that both the receiver and committee should join in executing the fee-farm grant. The appointment of the receiver was made by the Lord Chancellor, exercising the authority of the Court of Chancery: *In re Fitzgerald* (1); *Ex parte Grimstone* (2). The receiver cannot be treated as agent for the lunatic owner: La Touche's Furlong's Landlord and Tenant, p. 138; Kerr, Receivers, p. 3. The practice in minor matters follows the view we present: Edge, Leases, p. 217, note (a).

Jellett, K.C., and G. Y. Dixon, for the committee:—

By section 17 of the Act the committee, and the committee alone, is substituted for the lunatic owner as the person to execute the grant. The receiver appointed by the Lord Chancellor in a Lunacy matter is not appointed by a Court of Equity: Story, Equity Jurisprudence (2nd English edition), par. 1364, note 7; *Sherwood v. Sanderson* (3); *Beall v. Smith* (4); *In re Birch* (5). In *Batteste v. Maunsell* (6) the fee-farm grant which was held to operate so as to break the entail was executed by the committee of the lunatic alone, though there was a receiver appointed in the matter. The language of Lord O'Hagan and of Lord Justice Christian, referring to sect. 17 of the Renewable Leasehold Act, shows that they considered a fee-farm grant so executed valid.

(1) 2 Sch. & Lef. 432.

(2) 2 Ambl. 706.

(3) 19 Ves. 294.

(4) L. R. 9 Ch. App. 85.

(5) 29 L. R. Ir. 274.

(6) I. R. 10 Eq. 97; on app. 314.

LORD ASHBOURNE, C. :—

This case raises an interesting question as to the proper parties to execute a fee-farm grant under the Renewable Leasehold Conversion Act where the owner is a person under legal disability. The machinery provided by the statute is frequently called into operation in both branches of the jurisdiction of the Lord Chancellor—minor matters and Lunacy matters. In the case of minors the uniform practice has been to have the fee-farm grant executed by the receiver as well as by the guardian ; while in Lunacy matters a different practice has prevailed, and the receiver has never been made a party to the grant, which has been always executed by the committee alone.

By the order made in this matter on July 24, 1902, the committee, Mr. James Lahiff, was given liberty to execute to Mr. Boland a fee-farm grant in lieu of a renewable lease of certain lands, the reversion of which is vested in the lunatic as owner. In accordance with the practice Mr. Boland's solicitor prepared a draft fee-farm grant, which he sent to the solicitors for the committee for approval. This draft did not propose to make the receiver in the matter a party to the grant. The draft was submitted to Mr. Fleming, K.C., as counsel for the Lunacy department, who wrote the following memorandum in the margin :—
“ Under sections 17 and 35 of the Renewable Leasehold Conversion Act this grant must be made by the committee of the lunatic's estate and the receiver who is in actual receipt of the rent of the property, jointly, in order that a valid grant may be made within this statute.” The difficulty so raised was brought before the Registrar, who directed that a joint opinion should be obtained from Mr. Fleming and Mr. Jellett, the counsel for the committee—as to whether in a Lunacy matter it was necessary to make the receiver a party to a fee-farm grant under the Renewable Leasehold Conversion Act. After consultation Mr. Fleming adhered to the view which he had already expressed, but Mr. Jellett formed the opinion that the receiver was not a necessary party. The committee proposed to act upon Mr. Jellett's opinion and to execute the fee-farm grant without joining the receiver ; but Mr. Boland objected, and applied for an order that the receiver should be directed to join with the committee in executing the fee-

Lunacy.
1903.

In re
LAHIFF.

Lunacy. farm grant to which he was entitled. The application came before
 1903. me on the 17th instant, but when it was opened it occurred to
In re me that as it involved a challenge to the regular practice of the
 LAHIFF. department, and raised a question affecting possibly the validity
 Lord of all the fee-farm grants executed previously, not only in this
 Ashbourne, C. matter but in all other Lunacy matters, it would be an appropriate
 case to ask for the assistance of the Lords Justices, who are not
 only my colleagues in the Court of Appeal, but have also, along
 with the Master of the Rolls, been associated with me in the Lunacy
 jurisdiction by the recent Letter under the Sign Manual of the
 King, in accordance with the provisions of section 4 of the
 1 Edw. 7, c. 17.

In the argument which has just been addressed to the Court so constituted Mr. Wilson has loyally supported the view of Mr. Fleming that the case is governed by the proviso at the end of section 35, which is as follows:—"Provided also that in every case in which any person, not being the owner as herein-before defined, is in possession . . . as receiver under any decree or order of a Court of Equity, the person in possession . . . by virtue of such decree or order, shall, jointly with the person who but for such possession . . . would under this enactment be deemed the owner . . . be deemed to be the owner for the purposes of this Act." Mr. Wilson contended that the receiver in this matter "is in possession as receiver under a decree or order of a Court of Equity," and that therefore, having regard to the proviso, he must join with the committee in executing the grant, the committee being directed to act in substitution for the owner by section 17. This contention has been met by the objection—based on the nature of the jurisdiction of the Lord Chancellor in Lunacy—that the receiver in this case has not been appointed by the decree or order of a Court of Equity, but under a wholly distinct and special jurisdiction.

I am of opinion that the objection so taken disposes of the argument founded on the proviso in section 35. The jurisdiction in Lunacy flows from the Sovereign as *Parens Patriae*. Originally it was part of the Royal Prerogative to have the custody of idiots, with the right to take and use the profits of their estates, and to have the custody of lunatics and the management of their estates,

while both classes of these afflicted persons secured the benefit of the Royal protection. But in early times it became impossible for the Sovereign to execute this jurisdiction himself, and it became necessary for him to delegate his powers. Accordingly, the custody of lunatics and idiots and their estates was delegated under the Sign Manual of the King to some great officer of the Crown; at first, generally, to an ecclesiastic, and subsequently more usually, though not of necessity, to the Lord Chancellor. However, it was not by virtue of the Lord Chancellor's patent, nor by the delivery to him of the Great Seal, that this jurisdiction was conferred upon him, but it was by the entirely subsequent act of sending him the King's Letter under the Sign Manual. The old form of King's Letter mentioned the Lord Chancellor's name in person, and expressly described the business thereby delegated as portion of the province of the prerogative. In the new form of King's Letter under which this Court exercises its jurisdiction the same features are apparent. The jurisdiction so entrusted has been regulated and controlled by statutes, and these statutes are careful to preserve the distinct nature of the jurisdiction. The statute of 1871 requires that all orders made under this jurisdiction are to be entitled "In Lunacy." There is nothing to indicate or suggest when an order is made "In Lunacy" that it is made by virtue of any other jurisdiction, or in the Division of High Court to which the equitable jurisdiction of the old Court of Chancery was transferred by the Judicature Act. Every such order is made in a wholly separate jurisdiction, complete in itself; and the appeal from an order in Lunacy lies and always lay to the King in Council, and not according to the course in which orders of the Chancery Division now are, or orders of the old Court of Chancery formerly were, reviewed on appeal. Accordingly, I make this the main ground of my decision, that the receiver here is not the receiver of a "Court of Equity," but is a receiver "In Lunacy" appointed by the Lord Chancellor to receive for him and for the benefit and protection of the lunatic the rents of the lunatic's property.

It was also argued that even if we were to hold that the receiver here has been appointed by a Court of Equity, he is not such a receiver as is mentioned in sect. 35, and Mr. Jellett

Lunacy.

1903.

In re
LAHIFF.

Lord
Ashbourne, C.

Lunacy. has contended that the context shows that the proviso is only
 1903. dealing with the case of receivers appointed over the property of a

In re person to receive his rents *in invitum*. That argument is entitled
 LAHIFF. to some weight, but I prefer to rest my judgment on the former

Lord
 Ashbourne, C. ground.

Authorities have been cited which are venerable from their age, and must be considered. *In re Fitzgerald* (1) came before Lord Redesdale in 1835. The passage which Mr. Wilson read from the report did not at all commend itself to my mind when I heard it, and I was pleased to find that the account there given of the jurisdiction in Lunacy was challenged in Story's Equity Jurisprudence (par. 1364). I have already pointed out that the jurisdiction in Lunacy is part of the Crown Prerogative, expressly delegated by the King's Letter, and that it is not the case, as Lord Redesdale is reported as saying, that the superintendence of the management of the property and person of lunatics originates in the authority of the Court of Chancery. I do not think the case of *Ex parte Grimstone* (2) much touches the question before us. Nor am I struck by the definitions of "Receiver" given in Furlong's Landlord and Tenant, and Kerr on Receivers. The receiver here is acting under the directions of the Lord Chancellor for the owner, who is unable to receive for himself.

The judgments of Lord Eldon in *Sherwood v. Sanderson* (3), and of Lord Justice James in *Beall v. Smith* (4), show conclusively that the jurisdiction of the Lord Chancellor in Lunacy is totally distinct from his jurisdiction in Chancery. *Batteste v. Maunsell* (5) is a case of very considerable importance, though the question argued here was neither discussed nor decided there. But the entire question in the case turned upon the validity of the fee-farm grant, and the fee-farm grant in that case was executed by the committee of the lunatic owner alone, and not by the receiver who was appointed in the matter. The decision pronounced by the Vice-Chancellor, and the judgments affirming it, of Lord O'Hagan and Lord Justice Christian, in the Court of Chancery Appeal,

(1) 2 Sch. & Lef. 432.

(2) 2 Ambl. 706.

(3) 19 Ves. 294.

(4) L. R. 9 Ch. App. 85.

(5) I. R. 10 Eq. 97, 314.

assume that the fee-farm grant was validly executed, and it is almost impossible to conceive that, if the grant could have been questioned on the ground now put forward, the point would have escaped the very acute minds of the Judges before whom the case came.

Lunacy.
1903.

In re
LAHIFF.

Lord
Ashbourne, C.

I am, therefore, of opinion that the contention of Mr. Jellett is well founded, and that there is no reason to suggest that the practice hitherto prevailing in Lunacy should be altered. I wish to add that neither do I see any reason for changing the practice that has been adopted in minor matters.

FITZ GIBBON, WALKER, and HOLMES, L.JJ., concurred.

Solicitors for the applicant: *Lane & Horan.*

Solicitors for the committee: *Browne & Maunsell.*

G. Y. D.

MAC PHAIL v. PHILLIPS.

(1904. No. 10.)

Barton, J.
1904.

Jan. 25.
Feb. 3.

Will—Construction—Ejusdem generis—“All my household furniture and effects in my residence”—Wool in store forming part of residence.

A testator bequeathed his house in Abbey-street to his son for life, and, after intervening provisions, bequeathed to him “all my household furniture and effects in my residence, Abbey-street, aforesaid.” At the time of the testator’s death there was a large quantity of wool, part of his stock-in-trade, stored in a store which was at the rear of and admittedly formed part of his residence. The will contained a residuary bequest:—

Held, that the wool did not pass under the bequest to the son, but was included in the residuary gift.

ORIGINATING SUMMONS.

John Phillips, of Abbey-street, Wicklow, victualler, made his will, dated the 3rd October, 1900, and thereof appointed Francis W. Mac Phail and William Desaix executors and trustees. He directed his debts and funeral and testamentary expenses to be paid, and devised and bequeathed unto his son Francis his house and premises, Main-street, Wicklow, known as

Barton, J. the Catholic Club, also his houses in Castle-street and Fitzwilliam-road, Wicklow, also his house in Abbey-street, Wicklow, for his (Francis') life, with certain remainders for other sons and the children of his daughter; he devised and bequeathed certain lands to his sons Joseph and Francis for their lives, with remainders for other sons and the children of his daughter, and proceeded:—"I bequeath unto my son Francis all my household furniture and effects in my residence, Abbey-street, aforesaid. I bequeath to my sons Joseph and Francis all my live stock, horses, and farm produce. I bequeath the schooner 'Progress' to my son Bernard, and the schooner 'Mary Ann' to my son Francis. All the rest, residue, and remainder of my property I give" to his trustees upon certain trusts for his sons and daughter and her children.

The testator died on the 5th September, 1903.

William Desaix renounced, and probate was granted to Francis Mac Phail on the 15th October, 1903.

This summons was taken out by Francis Mac Phail as plaintiff against Francis Phillips as defendant, for the determination of the question whether a quantity of wool in a store at the rere of the testator's residence passed to the said Francis Phillips, or formed part of the residuary personalty.

Two affidavits were filed on behalf of the plaintiff, from which it appeared that at the testator's death a quantity of wool—amounting to about 4000 lbs.—was stored in a store at the rere of his house: it was so stored since about the end of May, or beginning of June, 1903; the store was situate in a yard at the rere of the testator's residence at Abbey-street, but separated therefrom by a public road called Fitzwilliam-road; the residence fronted Abbey-street, and extended in the rere to Fitzwilliam-road; the store was originally held under a yearly tenancy from Earl Fitzwilliam, at a rent of £7 17s. 6d., but by a lease dated the 29th June, 1901, the earl demised to the testator the dwellinghouse and premises, his residence, and also the said yard and store for ninety-nine years at £10 a year.

An affidavit by the defendant stated that he was the testator's eldest son, and, alone of the brothers, always assisted the testator in his butcher's and wool-dealing business, and he himself bought the wool in question, in addition to about £10 worth, which he bought

since his fathers' death, all which wool was at present stored in the yard. That yard had always been used as the yard of the residence in Abbey-street, bequeathed to him, and considered as an adjunct thereto: the residuary bequest comprised for the most part four houses in Castle-street, purchased by the testator about six months previous to his death, and moneys to his credit in bank.

Barton, J.

1904.

MACPHAIL

v.

PHILLIPS.

Wakely, K.C., for the plaintiff:—

The wool did not pass under the gift of "household furniture and effects." The word "household" governs effects as well as furniture: "effects" must be restricted to articles *ejusdem generis* with household furniture: and here there is a residuary clause: *Northey v. Paxton* (1); *Campbell v. M'Grain* (2); *Re Miller*; *Daniel v. Daniel* (3).

Sealy, for the defendant:—

The word "effects" used *simpliciter* will carry the whole personal estate: *Michell v. Michell* (4); and Lord Eldon in *Church v. Mundy* (5) says (p. 406):—"The best rule of construction is that, which takes the words to comprehend a subject, that falls within their usual sense, unless there is something like declaration plain to the contrary."

In *Parker v. Marchant* (6), Knight Bruce, V.-C., applying *Church v. Mundy* (5) and *Michell v. Michell* (4), does not consider himself (p. 303) authorised to depart from the general interpretation, conceiving it to be in that case not only consistent with propriety of language and expression, but to be at least as probably conformable with the testator's views and intentions to be collected from the whole will as any other construction. The rule mentioned by Romilly, M.R., in *Swinfen v. Swinfen* (No. 4) (7), that "one word particularizing one limited description of property, followed by general words, will not cut down the general words to property of the same character as that comprised in

(1) 60 L. T. (N. S.) 30.

(2) I. R. 9 Eq. 397.

(3) 61 L. T. (N. S.) 365.

(4) 5 Madd. 69, 71.

(5) 15 Ves. 396.

(6) 1 Y. & C. (Ch.) 290.

(7) 29 Beav. 207.

Barton, J. 1904. the simple word, although the general words will be so confined, where there has been a long enumeration of different classes of property previously," though dissented from by Kekewich, J., in *MacPhail v. Phillips*. *Northey v. Paxton* (1), has still some weight.

In *Northey v. Paxton* (1), the scheme of the will pointed to a limited construction of "household furniture and effects"; but the scheme of the will in this case points to a wide construction. If *Northey v. Paxton* (1) is followed "household furniture and effects" is equivalent to "furniture and household effects"; but this is a strained construction. In *Watson v. Arundel* (2), where there could not be a total or partial intestacy, it was held that a bequest of "plate, house-linen, furniture, and all other effects in the house at the time of my death," passed a horse, carriage, car, and some hay in the yard and out-offices, but not a sum of cash in the house. In *Anderson v. Anderson* (3) also, a case of a deed, the general interpretation was adopted by Lord Esher, M.R., and Lopes and Rigby, L.JJ., following and approving the principles laid down in *Parker v. Marchant* (4), and affirming the decision of Wright, J., in the Court below.

Wakely, in reply:—

Anderson v. Anderson (3) was the case of a deed, and the question was simply whether the words used were sufficient to carry the chattels in dispute. Here the question arises on a will with a residuary clause. In that case, moreover, the words were of the widest signification.

Feb. 3.

BARTON, J.:—

Upon this originating summons I have to determine a question upon the construction of the will of John Phillips, victualler and merchant, residing at Abbey-street, Wicklow, who died on the 5th September, 1903, having made his last will, dated 3rd October, 1900, probate of which was granted on 15th October, 1903. At the back of testator's residence in Abbey-street there was a yard and store which was demised to him, with the house in

(1) 60 L. T. (N. S.) 30.

(2) I. R. 10 Eq. 299.

(3) [1895] 1 Q. B. 749.

(4) 1 Y. & C. (Ch.) 290.

Abbey-street, under a lease for ninety-nine years, from Lord *Barton, J.*
 Fitzwilliam. He possessed other house property in Wicklow, a 1904.
 farm in the neighbourhood, live stock, horses, and farm produce. *MACPHAIL*
 Being a victualler and merchant, he also possessed considerable *v.*
 stock in trade, which included, at the time of his death, about *PHILLIPS.*
 4000 lbs. of wool. This large quantity of wool happened to be,
 and to have been for some three months, stored in the store in
 the yard at the back of his residence.

The testator by his will, among other dispositions, made the following bequest:—"I bequeath unto my son Francis all my household furniture and effects in my residence, Abbey-street, aforesaid." He had already bequeathed this residence to the same son Francis for his life. The question for the decision of the Court is whether the 4000 lbs. of wool stored in the store at the rear of his residence passed under the bequest of "household furniture and effects in my residence," or whether it passed under a residuary clause under which he bequeathed "all the rest, residue, and remainder of my property," to trustees upon certain trusts, which trusts are not material for our present purpose.

It is conceded that this store at the rear of the testator's residence ought to be considered part of the residence of the testator, and I shall assume that everything stored in this store answered to the description "in my residence." The case turns upon the meaning of the word "effects" in this particular context, in which "effects" is coupled with "furniture"; and the words "furniture and effects" are preceded by the word "household," and are followed by the words "in my residence." The word "effects" is a word which, when it occurs *simpliciter*, may have the widest possible meaning, embracing almost every kind of property. But it may have a restricted meaning, and the mere occurrence of a subsequent residuary clause may have the effect, as was pointed out by Lord Hatherley in *Gibbs v. Lawrence* (1), of leading a Court to give a restricted meaning to the word. The word "effects" may also be, and often is, qualified or localised by its context. In the present bequest it is both qualified by the word "household," and localised by the words "in my residence, Abbey-street." I

Barton, J. do not rest my judgment upon the doctrine of *ejusdem generis*—
 1904. — a doctrine which in cases of this kind, as was pointed out by
 MACPHAIL the Lords Justices in *Anderson v. Anderson* (1), should be applied
 PHILLIPS. with caution, being a valuable servant but a dangerous master.
 In my opinion the word “household” in this bequest governs
 both “furniture” and “effects.” All “effects” in his residence
 answering to the description of “household,” *e.g.* all effects
 contributing to the use or ornament of the house, or use of the
 household, would pass under it. But this large quantity of wool,
 which was part of testator’s stock in trade, does not, in my opinion,
 answer to that description, and did not, in my opinion, pass by
 this bequest.

In a case of this kind very little assistance is gained from the citing of authorities. Several have been cited which have little or no bearing upon the construction of this will. They resemble it in nothing save in the occurrence in a different context of the word “effects”—a word which varies greatly in its meaning according to the context. For example, in *Campbell v. M’Grain* (2) the material words were “and all other effects therein,” and the judgment of the Master of the Rolls turned largely upon the words “and other,” which do not occur in this bequest. In *Watson v. Arundel* (3) the word “household,” which in the present will is, in my opinion, a governing word, did not occur at all. In *Anderson v. Anderson* (1) the construction of the deed in question turned upon the effect of an enumeration of particular things, followed by the general words “and other goods, chattels, and effects”—a very different collocation of words from that in the present case.

The case which most resembles the present case is *Northey v. Paxton* (4), where the following passage in a will had to be construed by the Court:—“I give to my nephew . . . all the household furniture and effects belonging to me in and about my country residence.” Kekewich, J., said (p. 31), “I think the proper grammatical construction is, ‘all the household furniture, and all the household effects’; ‘household,’ I think, governs the two.”

(1) [1895] 1 Q. B. 749.

(3) I. R. 10 Eq. 299.

(2) I. R. 9 Eq. 397.

(4) 60 L. T. (N. S.) 30.

I am inclined to adopt a like construction of the very similar words in the present will.

Accordingly, I hold that this large quantity of wool did not pass under this bequest of "all my household furniture and effects in my residence, Abbey-street," but formed part of the general residuary bequest.

Barton, J.
1904.

MACPHAIL
v.
PHILLIPS.

Solicitors for the plaintiff: *J. K. Toomey & Co.*

Solicitors for the defendant: *Hamilton & Craig.*

D. M'C. M.

ATTORNEY-GENERAL (BOSWELL) *v.* RATHMINES &
PEMBROKE JOINT HOSPITAL BOARD.

(1902. No. 508.)

V.-C.
1903.

June 3, 4, 5.
July 31.

Appeal.

Dec. 11, 14,
15, 16.

1904.

Feb. 1.

Nuisance—Smallpox hospital—Residential district—Injunction.

Action for an injunction to restrain the defendants from erecting a smallpox hospital on lands situated near the village of C., county Dublin, in the urban district of Rathmines. There were 137 houses, with about 753 inhabitants, within a quarter mile, and 422 houses, containing about 2321 inhabitants, and four public institutions, with about 361 residents, within a half mile, of the proposed hospital. There was nothing to show that the defendants were precluded from selecting a site outside their respective districts, if necessary, or that they had attempted to do so. There was conflicting expert evidence as to the suitability of the site selected, and as to the risk of the spread of smallpox from a smallpox hospital, by reason of the possibility of the disease being carried without actual contact through the air for a considerable distance:—

Held, by the Court of Appeal (reversing the decision of the Vice-Chancellor), that an injunction should not be granted.

THE plaintiff, Mrs. Annie Boswell, was the owner of twelve houses known as St. James'-terrace, of the house and lands known as St. James', and of a large plot of land, as yet unbuilt upon, adjoining the said houses and premises. The poor law valuation was £575. The plaintiff occupied St. James' House herself, and derived a profit rent of £655 per annum out of St. James'-terrace from tenants to whom the terrace was let.

V.-C.
1903.
ATTY.-GEN.
v.
RATHMINES
& PEMBROKE
JOINT
HOSPITAL
BOARD.

The defendants, who were composed of a joint board, consisting of representatives from the urban districts of Pembroke and Rathmines, had recently purchased the lands and premises known as Vergemount House, Clonskeagh, for the purpose of erecting a smallpox hospital thereon, and had already commenced building the said hospital.

The plaintiff alleged that the site of the proposed hospital was in the centre of a thickly-populated district and in close proximity to the premises belonging to her, and that the hospital, if established on that site, would be a nuisance and a source of great danger of infection to herself and her family, and to the inhabitants of the surrounding district. The plaintiff also alleged that several of her tenants in St. James'-terrace had signified their intention to surrender their tenancies in the event of the hospital being erected upon the said site, and that the value of her property would be seriously diminished.

The defendants alleged that the lands of Vergemount comprised about 26 acres, and were completely isolated; that in consequence of a threatened outbreak of smallpox they had entered into a contract in February, 1902, for the immediate erection of a temporary galvanized iron hospital, with twenty beds, for the reception of any such patients, and that they had also advertised for tenders for the erection of a permanent hospital for infectious diseases, with fifty beds, and that a tender for same had been accepted. The defendants denied that the site of the said hospital was in the centre of a thickly-populated district, but alleged that same was surrounded by fields, and was not in close proximity to the premises of the plaintiff, but was distant therefrom some 213 yards and 146 yards respectively, and they also denied that it would be in close proximity to any other dwelling-houses in the neighbourhood.

The defendants also alleged that the hospital would be under the supervision of a resident medical officer, and that every precaution would be taken to prevent any danger of infection, and that the hospital could not cause any appreciable danger of infection to the plaintiff, her family, or tenants, or to the inhabitants of the surrounding district, and that no more suitable site could be found in their respective districts, and that it was more benefi-

cial to the health of the public that such a hospital should be established, than that no provision should be made to remove from private houses, and isolate, persons suffering from smallpox in said districts. The defendants denied that the value of property in the neighbourhood would be prejudicially affected by the establishment of the hospital.

The plaintiff's claim was for an injunction to restrain the defendants from erecting the proposed hospital and using it as a smallpox hospital.

The evidence was of a voluminous character, and consisted chiefly of the opinions of medical experts, who differed widely as to the suitability of the site for a smallpox hospital, and also as to the danger of infection to the neighbouring population. In the latter connection the theory of "aerial convection" was much discussed. The details of the evidence, so far as material for the report of the proceedings in the Court below, appear sufficiently from the argument of counsel, and the judgment of the Vice-Chancellor. In the Court of Appeal the evidence is exhaustively stated and analysed in the judgments of FitzGibbon and Walker, L.JJ.

V.-C.
1905.

ATTY.-GEN.
v.

RATHMINES
& PEMBROKE
JOINT
HOSPITAL
BOARD.

O'Connor, K.C., Henry, K.C., and M'Cann, for the plaintiff:—

The present case is distinguishable from similar cases in which an injunction has been refused. In *Fleet v. Metropolitan Asylums Board* (1) a smallpox camp was erected 685 yards away from plaintiff's shop, and 300 yards away from other houses, and 80 yards away from part of plaintiff's property; only convalescent patients were received; and it was a country district. In *The Attorney-General v. Corporation of Manchester* (2) the proposed hospital was within 240 yards from two public roads, and 256 yards from the nearest dwelling, and 90 yards from a cemetery. In that case the scientific evidence was defective, and failed to show that the apprehended danger would in fact ensue, and there were only fifteen houses within the half-mile radius. In *The Attorney-General v. Guildford Joint Hospital Board* (3) the hospital was surrounded by a common, while in *Harrop v. Corporation of*

(1) 2 T. L. R. 361. (2) [1893] 2 Ch. 87. (3) 12 T. L. R. 54.

V.-C. 1903. *Ossett* (1) the hospital was 250 yards from the mansion-house, and 100 yards from the privies of a factory. It was surrounded by a wall 6 feet in height, enclosing an open space of 40 feet. ATTY.-GEN. None of these cases is at all analogous to the present, where the RATHMINES & PEMBROKE JOINT HOSPITAL BOARD. hospital is in a populous locality. There are 137 houses, containing 753 inhabitants, within a quarter-mile radius, and 422 houses, with 2321 inhabitants, within half a mile, and four institutions of a public character, in which there are about 361 persons residing. *Bendelow v. Guardians of Wortley Union* (2) is an authority in our favour.

The Solicitor-General, K.C., Matheson, K.C., Blood, K.C., and Brunskill, for the defendants:—

The defendants are not entitled to succeed merely on the grounds of dislike, or for merely sentimental reasons. In the case of a future nuisance there must be strong evidence to show that the apprehended nuisance will, in fact, arise: *Attorney-General v. Corporation of Manchester* (3). In *Fleet v. Metropolitan Asylums Board* (4) an injunction was refused, although the hospital was only 80 yards away from the dwelling-houses, and contained 1000 to 1200 patients. In the present cases the interval is very considerable.

The plaintiff's case really rests on the theory of "aerial convection." That doctrine is precisely in the same position as it was fifteen years ago, and is a matter of pure speculation. In the *Fulham* case it was sought to establish the theory from the fact that more cases of smallpox occurred in the quarter-mile radius than in the half-mile, and that cases of infection were more numerous on the side of the prevailing winds. But in that case there was no investigation into individual cases, or the first case that arose. As regards the *Thames Hospital Ships* case, which was also relied on, it was sought to prove the theory from the fact that there was an outbreak of smallpox on the Essex coast, opposite the ships, on which patients were treated, and that there was no contact between the ships and the shore. But the whole of Essex was full of smallpox, 2000 cases having come from

(1) 14 T. L. R. 308.

(2) 57 L. J. Ch. 762.

(3) [1893] 2 Ch. 87.

(4) 2 T. L. R. 361.

London, and so no definite theory can be based on that case, unless it could be shown whether or not the first cases, that occurred on the coast had been carefully investigated and traced. It was said that the disease disappeared when the ships were removed, but that only showed that the disease had died out of London, from which the country was really infected. Dr. Thresh was the only medical man supporting this theory who had anything like practical experience; the others only relied on their reading on the subject. Dr. Hope, of Liverpool, and Dr. Day, of the Cork-street Fever Hospital, stated that, so far as they investigated them, they always found cases that occurred in the vicinity of their respective hospitals to have resulted from contact. *Bendelow v. Guardians of Wortley Union* (1) is the only reported case where an injunction was granted. The scheme was approved of by the Local Government Board, and the case cannot be affected by the rules and regulations of the English Local Government Board. Every care was taken in the selection of the site, which was the best that could be procured in the districts over which the defendants exercise control.

As regards the question of injury to the neighbouring property, none of the defendants' tenants has served notice, and only two houses out of seventy in the vicinity of the hospital are to let. The defendants have sold for £2400 fourteen out of the twenty-five acres, which they purchased for £3500, which shows the value of adjoining property has not been depreciated.

Henry, K.C., in reply :—

All the plaintiff has to show is a reasonable apprehension of danger. There is no case reported where an injunction was refused in a district like the present, or containing such an adjoining population. There are 137 houses, with 753 inhabitants, within a quarter-mile radius, and 422 houses, and four public institutions, with about 2682 inhabitants, within a half-mile. Outhouses of some of the houses come within 27 yards from the proposed hospital, and the plaintiff's house is only 300 yards off. Moreover, the plaintiff is not merely seeking to redress a private

V.-C.
1903.

ATTY.-GEN.
v.

RATHMINES
& PEMBROKE
JOINT
HOSPITAL
BOARD.

V.-C. grievance, but represents the inhabitants of the district, all of
1903. whom are equally concerned.

ATTY.-GEN.
v.
RATHMINES
& PEMBROKE
JOINT
HOSPITAL
BOARD.

As to the theory of aerial convection, it must not be lightly set aside. It is a theory which is taught in all the medical text-books, and is positively supported by the testimony of experts, while upon the other side it is not absolutely contradicted, but only doubted. Outside Cork-street Fever Hospital the number of cases that occurred was out of all proportion to the number of cases that occurred within an infected radius in the poor parts of the city. In the Fulham case 170 out of 200 houses became infected, and in the Thames Hospital Ships case there was no contact with the shore, yet the death-rate from smallpox increased in the part of the coast near the ships, five times higher than in other parts of Essex, until the ships were removed, when the disease disappeared from the shore.

This is essentially a public nuisance, having regard to the number of the population and houses, and character of the inhabitants. The establishment of such an institution must lead to a deterioration in the value of property, as no reasonable man, by residing in its vicinity, would care to expose himself and his family to constant risk of infection, and continual dread and apprehension.

It was quite possible for the defendants to have procured a site outside the limits of their respective districts, but they have made no attempt to do so. There was no public inquiry. The erection of a smallpox hospital in a district such as this would be quite contrary to the rules of the English Local Government Board, which were, no doubt, framed under the guidance of able experts.

July 31.

THE VICE-CHANCELLOR:—

This is a case of much difficulty and public importance. The action is one of the class termed *Quia timet* actions, and is brought not so much to obtain relief against wrongs already committed by which the plaintiffs have suffered actual damage, as to protect them from damage which they have reason to fear would be the result of the work which the defendants are carrying out, if it were allowed to proceed. In

such cases it must be shown that the complainants entertain a reasonable, well-grounded apprehension that the work which the defendants are carrying out would, if allowed to proceed, result in substantial damage to the complainants. A mere fanciful objection to it will not be a sufficient ground for obtaining relief, but it must be shown that the work is, or would be, a substantial injury to the persons or property of the complainants. It is not alleged that there has been any want of *bona fides* on the part of the defendants, who are acting in the discharge of their public duties, and it is not necessary that this should be shown. It is their duty to provide, as far as possible, for the protection of the public from the dreaded spread of the disease of smallpox, but they must discharge that duty having regard to the rights of others.

The disease is spread in a manner that has not yet been discovered with anything like certainty. It has been attributed by some experts to aerial convection, that is to say air-borne; and by others to actual contagion.

We are necessarily in this, and in similar cases, obliged to depend on the opinions of experts who have made such questions their special study, and in all cases of the kind we have to expect such opinions will differ widely, and that each side will be confident that theirs is the correct view, and that the views of their opponents are erroneous. All parties are agreed that the disease is highly infectious, but as to the nature of the infection they differ. On the evidence before me I am not able to form any decided opinion whether the theory of "aerial convection" is correct, and I am not obliged to do so, as I think there are other grounds on which the case may be decided.

All parties agree that the most effectual mode of guarding against the spread of the infection is to have the persons affected as far as possible isolated, and prevented from spreading the disease by contact or by diffusing air which has become in some way filled with infection. For this purpose it is agreed on by all that what are termed "Isolation Hospitals" are necessary. With the nature and construction of such hospitals I have not to do, for on either theory they are necessary, and the defendants are entitled to assume that such matters would be well planned

V.-C.
1903.

ATTY.-GEN.

v.

RATHMINES
& PEMBROKE

JOINT

HOSPITAL
BOARD.

V.-C. and constructed. But the very name of such hospitals shows
 1903. that they should be isolated. From the natural dread of the
 ATTY.-GEN. disease it must be a matter of great difficulty to procure sites
 v. where they may be erected. I was for some time much struck
 RATHMINES with the argument that from the nature of the district under
 & PEMBROKE the charge of the defendants it would be very difficult to
 JOINT procure any site within that district, and that the site in
 HOSPITAL question was perhaps as free from objection as any other
 BOARD. within it. But this was, I think, deprived of much of its
 weight by finding that there is no legal objection to the
 defendants going outside the district to look for a site. It
 seems that both the defendants and the inspector of the Local
 Government Board acted on the supposition, shown to be
 erroneous, that they could not look for a site elsewhere. I
 have nothing before me to show that such a site could not be
 procured elsewhere.

I must, therefore, consider whether the proposed site is a suitable one. In many respects it is. It is fairly elevated ground in an airy position, and, as I am informed, one where good drainage can be constructed. Whether this is so as to the drainage, I have no sufficient evidence, but I assume that such is the case. But as to the general position of the place selected I think there are very grave objections. It is in a thickly inhabited neighbourhood, and almost surrounded by houses already erected and inhabited; in one direction only a few yards distant from habitations, and in other directions adjoining houses of different classes of persons. It is quite close to the large village of Clonskeagh, in which there are a factory and a large number of workmen's cottages inhabited, where infection would be very likely to arise. A little farther off, and in all directions, a very large number of high-class houses have been erected within the last few years, and many are in course of erection. It abuts on public and private roads, and on one or more tramways, much travelled on between the city and suburbs.

It appears from the evidence and the plans and maps of the locality that there are 137 houses, with about 750 inhabitants, within a quarter mile from the proposed hospital; and 422 houses, with about 2300 inhabitants, within a half mile, and four public institutions. There does not appear to be much of isolation in this.

On this subject I may refer to the rules of the English Local Government Board, not for the purpose of being bound by them, but as showing what they who had so much experience in the subject have considered to be the limits of safety for erecting smallpox hospitals. They will not allow one to be erected within one quarter-mile radius where there are more than 200 people inhabiting it, nor within a half-mile radius where there are more than 600 people inhabiting it. I have therefore an official opinion that a smallpox hospital cannot be safely placed where it would be within less than these limits, and such opinion is entitled to great weight. No matter whether the infection is air-borne or contagious, such objection equally applies. I have before me evidence entitled to great weight that such infection may be air-borne, and I cannot hold with any approach to certainty that it may not be. But it is not confined to this, for the plaintiff contends that the infection is certainly conveyed in some manner, and whether it be "air-borne" or contagious does not matter if it be conveyed. It appears sufficiently from the evidence that in the neighbourhood of smallpox hospitals there is a special prevalence of the disease. This appears especially in the case of Cork-street Hospital in the last outbreak, and in the very important case of the Thames Hospital Ships, which was so carefully inquired into by Dr. Thresh, who has devoted so much care and ability to the Thames Ships case. I am satisfied upon the evidence that a serious outbreak, or, at least, a very great increase of the malady, appeared in these cases in near proximity to the hospitals for smallpox patients, and apparently in connection with them respectively. It is impossible for me to say how this occurred; but whether it was by aero-convection, or by contagion, or some other mode not yet known, the result is that it is not safe in an outbreak of smallpox to reside in near proximity to a smallpox hospital, no matter how isolated or well conducted. The danger of infection diminishes as the distance increases. It is therefore most important to have an isolation hospital at a comparatively safe distance from thickly-populated districts. This does not appear to have been sufficiently regarded in the selection of the site in the present case. I do not impute any blame to what was done by the defendants, and am willing to believe that they

V.-C.
1903.

ATTY.-GEN.
v.
RATHMINES
& PEMROKE
JOINT
HOSPITAL
BOARD.

V.-C. selected what they believed to be the best site within their district. I am not satisfied that they sufficiently advertised for sites, 1903.
ATTY.-GEN. nor does it appear that any other site was proposed. I cannot
v. allow them to treat the question as one of saving expense, and
RATHMINES indeed they do not appear to have been unduly influenced by any
& PEMBROKE such consideration. It is of course to be expected that if a suitable
JOINT site is so difficult to find, the owner of one will be sure to ask a
HOSPITAL large price for it. The defendants do not appear, for the reason
BOARD. I have already mentioned, to have tried to find a site outside the limits of their own district.

There is a great conflict of evidence as to whether the plaintiff has shown reasonable grounds for the apprehension of serious injury to her own or her tenants' persons or their families, or their properties, from the establishment of a smallpox hospital at Vergemount. Very eminent physicians express strong opinions in direct contradiction of each other, and I do not feel compelled to decide who are right. I think that the evidence shows that the plaintiff has strong and reasonable grounds for the apprehension of danger to the health and lives of herself, her tenants, and their families from the establishment of this hospital on the site proposed.

The other ground relied on by the plaintiff is that the establishment of this hospital will be a serious cause of depreciation in the value of the surrounding property. The plaintiff has given only general evidence on this subject; but I am of opinion that if the hospital is established it will necessarily cause a depreciation. Few people would like to live close to a smallpox hospital, and many would certainly consider it a nuisance. It would be esteemed by many as a nuisance in itself and a source of danger to persons living in the neighbourhood. The conveyance of patients to and fro would be regarded with apprehension. The friends and relations of such patients would also, in spite of the best regulations, be more or less regarded as causes of danger. I do not, however, look upon this cause of complaint as nearly so important as the former. On the whole I have come to the conclusion that the plaintiff has made out a case for granting the injunction prayed.

The defendants appealed to the Court of Appeal (FITZ GIBBON, WALKER, and HOLMES, L.JJ.).

Appeal.
1903.

The Solicitor-General, and Matheson, K.C. (with them *Blood, K.C., and Jefferson*), for the appellants.

ATTY.-GEN.
v.
RATHMINES
& PEMBROKE
JOINT
HOSPITAL
BOARD.

O'Connor, K.C., and Henry, K.C. (with them *M'Cann*), for the respondent.

Dec. 11, 14,
15, 16.
1904.
Feb. 1.

FITZ GIBBON, L.J. :—

This action is brought in the name of the Attorney-General at the relation of Mrs. Boswell, and also by Mrs. Boswell as plaintiff. The claim was for an injunction to restrain the defendants from building or establishing upon the lands of Vergemount, Clonskeagh, any Hospital or Hospitals for the reception of persons suffering from smallpox or other infectious diseases. But the evidence and the decree under appeal are confined to smallpox, and to the use of the premises for the purpose of a smallpox Hospital. The premises have been—and are—used for the reception of patients suffering from scarlet fever, measles, diphtheria, and other infectious diseases, but this use is not alleged to be actionable, and, therefore, the relief claimed must rest on some legal ground relating to smallpox only.

It is a *quia timet* action: the projected Hospital has not been built, but we are not altogether without experimental evidence of its probable effects, because a temporary iron Hospital was erected in January, 1903, and either in it or in an adjacent building six or eight smallpox patients had been treated before the trial, of whom two were then still upon the premises. To sustain the injunction, the law requires proof by the plaintiff of a well-founded apprehension of injury—proof of actual and real danger—a strong probability, almost amounting to moral certainty, that if the Hospital be established, it will be an actionable nuisance. A sentiment of danger and dislike, however natural and justifiable—certainty that the Hospital will be disagreeable or inconvenient—proof that it will abridge a man's pleasure, or make him anxious—the inability of the Court to say that no danger will arise—none of these, even accompanied by depreciation of property,

Appeal. will discharge the burden of proof which rests on the plaintiff, or
 1904. can justify a precautionary injunction, restraining an owner's
 ATTY.-GEN. use of his own land upon the ground of apprehended nuisance to
 v. his neighbours. These propositions, quoted from cases of authority,
 RATHMINES & PEMBROKE define the issue. The decision depends upon the facts proved in
 JOINT the particular case, with due regard to the opinions of experts so
 HOSPITAL far as they are founded upon facts; but with due regard, also, to
 BOARD. the decisions of other Courts pronounced upon similar evidence in
 Fitz Gibbon, other cases.
 L.J.

The lands in question contain about 14 acres, intended to be used as the only "Isolation Hospital" for the Rathmines and Pembroke Townships. The site is open, airy, and fairly elevated, with means of drainage and water supply to which no objection has been proved. It was selected by a committee of Commissioners, which included several medical men, and it was considered suitable by the Officers of Health for both Townships. The Local Government Board, after considering the agreement, sanctioned the loan of £3500 for the purchase of the land, and afterwards, under the Public Health Act, 1878, sect. 155, sanctioned the proposal to erect upon it an iron Hospital containing twenty beds for smallpox patients. All this could not justify the selection of an improper site, or the creation of a nuisance, and it is discounted by the fact that the selection was made under the erroneous belief that the Commissioners in making it were restricted to their own district. No less objectionable site within the district has been suggested, and the choice was at least deliberate and conscientious.

The ground of action—as stated—is that the site is in the centre of a thickly-populated district, in close proximity to a terrace of twelve houses belonging to the plaintiff, and to her own residence; that it adjoins land belonging to her as yet unbuilt upon; that the intended Hospital, if established on the said site, will be a nuisance, and will cause great danger of infection to herself, her family, servants, and tenants, and to the inhabitants of the surrounding district. I assume that the plaintiff may rely on any proved danger to her neighbours as increasing the danger of infection to herself, and I shall take the Hospital and all its surroundings into account accordingly.

The Townships contain a growing population already approaching 60,000. It does not clearly appear how many smallpox patients the Hospital is intended to accommodate. But I think that the possible maximum should be taken at whatever number an epidemic of smallpox is likely to bring in. The number of beds contemplated seems not to exceed twenty-five for each Township, fifty in all; but if a severe epidemic broke out, this being the only isolation hospital available, I suppose that patients above that number would have to be received into some sort of sheds or camp upon the place. Past experience has never produced in these Townships any number of smallpox cases approaching fifty at the same time. In 1894-5 there was an epidemic in which about 1000 cases were treated in Cork Street Hospital, but in 1894 only ten, and in 1895 only forty-two, cases were notified in Rathmines, and as these were spread over more than a year, only a small proportion of them can have been under treatment at the same time. Dr. Chapman states that it is a great many years since there has been any case in the Pembroke Township, and from 1896 until 1902 there was none in Rathmines. Though both Townships contain poor districts, the inhabitants generally are well-to-do, and Rathmines is described in the evidence as "very well vaccinated."

The alleged source of danger, therefore, is in all probability a small Hospital in, and for, a healthy district. In a *quia timet* action mismanagement or overcrowding is not to be assumed. The site to be exclusively used for Hospital purposes contains 14 acres, reserved as sufficient out of 26 acres which were purchased for the Isolation Hospital. Within the quarter-mile radius from the smallpox Hospital there are at present 137 houses, with a population of 753. Within the half-mile radius there are 422 private dwelling-houses, and four Institutions, with an estimated population of 2682. The nearest house to the temporary Hospital is seventy yards off. But the nearest to the intended Hospital will be 100 yards distant from it. The nearest of the plaintiff's houses is 213 yards, and her own residence is 281 yards, from the intended Hospital, and both are further from the present Hospital. There are some sheds and offices on a place described both as a dairy and as a horse-dealer's yard, which come up quite

Appeal.
1904.
ATTY.-GEN.
v.
RATHMINES
& PEMBROKE
JOINT
HOSPITAL
BOARD.
Fitz Gibbon,
L.J.

Appeal. close to the corner of Vergemount. Within the quarter-mile
 1904. radius there is the village of Clonskeagh, described as some dozen
 ATTY.-GEN. or so of small cottages, some of which are, by one witness, thought
 v. not fit for habitation.
 RATHMINES
 & PEMBROKE The objection alleged against this site is based on the theory
 JOINT of aerial convection—which means that smallpox is air-borne—
 HOSPITAL and that there are so many houses within its range as to create a
 BOARD. real danger of infection from the Hospital.
 Fitz Gibbon,
 L.J.

The English Local Government Board is said to refuse to lend money for the erection of any smallpox Hospital if there are more than 200 inhabitants within the quarter-mile, or more than 600 within the half-mile radius. As a counsel of perfection this condition may be commendable, but it cannot be complied with in many cases; it is not legal evidence of danger; and we have to see whether danger is otherwise proved. The leading scientific witness for the plaintiff is Dr. Thresh, Medical Officer of Health for the county of Essex; he would certainly not approve of a site if there were more than from 200 to 250 people within a quarter-mile, or more than about 500 at the outside within a half-mile radius. He considers Vergemount certainly a most improper site for an Isolation Hospital in which any case of smallpox is likely to be treated. The danger of infection by aerial convection is his chief objection to the site, and to prove the theory he refers to a number of cases in which smallpox has become prevalent in the neighbourhood of smallpox Hospitals; the most persuasive of these, which he regards as conclusive, is that of the Hospital Ships for the reception of smallpox patients from London, which, since 1884, have been moored in the Thames at Purfleet; he says that as soon as they got sixty or seventy cases on the ships outbreaks began on both sides of the river; that there has never been an outbreak in London which has not been followed by an outbreak in the Essex parishes opposite these ships. In an outbreak which commenced early in 1901, and went on until the middle of 1902, he alleges that there was no communication whatever between the Hospital Ships and the Essex shore, yet that smallpox appeared in Essex opposite the ships. In the parish nearest to the ships he says that 10 per cent. of the population were attacked, and smaller percentages as the distance increased, and he concludes that this case

put out of Court entirely the possibility of infection being introduced otherwise than from London and air-borne.

As to the 10 per cent. of infection in the Purfleet parish, and the 17½ per cent. of houses infected in the Fulham district which appears in the evidence, I must observe that a careful examination of the papers has failed to find any means of bringing out such startling figures, except the aggregation of long periods and successive epidemics before ascertaining the percentage—an arithmetical method calculated to produce a misleading estimate of the danger at any given time.

The theory is supported by Dr. M'Weeney, who would like to see no one whatever residing within a radius of one mile of a smallpox Hospital, and considers that the Hospital at Vergemount would be a source of danger to the population. He did not take into consideration the probable number of smallpox patients in it, though he says the smaller the number of the patients the smaller the danger; and his only objection to the place is the theory of aerial convection.

Sir John Moore does not consider Vergemount a suitable place for an Isolation Hospital in which smallpox cases are to be treated: the danger of spreading the disease from such a centre would be two-fold: first, by personal contact by what are called *fomites* or carriers of infection; and secondly, undoubtedly through the atmosphere; and he gives reasons for his belief that since 1881 the theory of aerial convection has advanced by leaps and bounds.

Dr. Roche gives his opinion that a smallpox Hospital on Vergemount will certainly be a source of danger to the inhabitants of the houses in the vicinity; he supports his opinion by what occurred in Dublin, in 1894, in the vicinity of Cork Street Hospital, and he is certain that the state of affairs there was caused by aerial convection.

Upon the evidence thus stated in outline, three questions arise—1. What is the theory? 2. How far has it been proved? 3. As proved, does it support a *quia timet* injunction against the establishment of the proposed Hospital at Vergemount? The theory is merely this—that smallpox travels through the air, without any other medium or *fomes* of infection. Within certain limits

Appeal.
1904.

ATTY.-GEN.
v.
RATHMINES
& PEMBROKE
JOINT
HOSPITAL
BOARD.
Fitz Gibbon,
L.J.

Appeal. this is admitted. For our purpose the theory must be proved to
 1904. apply to the Vergemount Hospital, *i.e.* that smallpox will travel—
 ATTY.-GEN. as a matter of great probability and of real danger—from a
 v. Hospital of the given size and circumstances to the residents
 RATHMINES & PEMBROKE JOINT within the given distances, across the given isolating space. The
 HOSPITAL. range, not the fact, of aerial convection is at issue. The theory
 BOARD. has for many years been the subject of acute differences of expert
 Fitz Gibbon, opinion, and it is so still. In *Fleet's Case* (1), in 1884, one witness,
 L.J. against the theory, fixed the range at a few feet, while another,
 who supported it, extended the area of appreciable danger in
 all cases to a mile, and in the case of a large Hospital to
 two miles.

Since 1884, knowledge “has advanced by leaps and bounds,” and in no department more rapidly than in that of medical science. On the whole, I am satisfied that the area of appreciable danger, as generally accepted, has been extended, and that the precautions regarded as reasonable have been extended too. But the expert opinions are as divergent as ever, the dogmas of the plaintiff's witnesses are rejected, and their instances are denied or explained away by men of their own profession, without qualification or ceremony, and in some cases without even an expression of deference or respect. Lawyers are accustomed to such conflicts, and Judges have to decide them by investigating the facts on which the truth must rest. The structure cannot be more stable than its foundation, and it is our duty to try whether the foundation is rock or sand, or at all events to ascertain the side to which the weight of evidence inclines. The spread of disease is still a mystery, but the veil has been raised a little here and there since 1884: analogies between animal and vegetable life, and between the germs of disease and the seeds of life, have been discovered or recognised. Ultra-microscopic life is now accepted as the explanation of much that was before attributed to mechanical or other causes. Some assert the human frame itself to be an aggregation of infinitesimal but independent organisms, and it is not beyond the bounds of the physical speculations of the twentieth century to suggest that, after 500 years, William of Wykeham's

motto may be parodied for a College of Modern Science in the humiliating form "Microbes makyth Man." The doctors on both sides now agree that in smallpox the *materies morbi* is some sort of living organism. What it is may be unknown. How and how far it travels is the question here; and I decline to accept any dogma of an expert upon that subject. The endless variety of Nature's action forbids the acceptance of any positive conclusion. Bee-borne pollen rides outside; mosquito-borne malaria is an inside passenger. Rags are an omnibus for all sorts of infection; rats are a special vehicle of the plague; water, milk, and oysters have all been convicted of conveying typhoid; in the vegetable world, the bird-borne mistletoe, the falling acorn, the bursting pod, the fissiparous weed that, starting from Australia, has choked Scotch lakes English canals and American rivers, the fungus that spreads in fairy rings, have each its own mode and range of propagation; and, for all we know, each may have its counterpart *materies morbi*. If so, why not the thistledown floating with the wind? I will neither accept nor reject the theory of aerial convection on any *a priori* ground. I must investigate the evidence on both sides for myself before deciding whether the plaintiff has proved her case.

That case is met by the defendants by disputing some of the plaintiff's allegations, and by evidence of facts inconsistent with the plaintiff's theory. The theory goes too far, for if it were true to the extent necessary, by the rules of equity, to sustain this injunction, every smallpox Hospital must be a centre of infection radiating beyond 14 acres, and for more than 100 yards in every direction, with such certain danger to the residents within that range as to make it *per se* an actionable nuisance. No large Hospital, and no Hospital, large or small, that was surrounded by a congested or unsanitary district, could fail to spread the disease in direct proportion to the number of patients which it contained, and to the unhealthiness of its surroundings, and in the inverse ratio of its airiness and isolation. In weighing the evidence for the theory, the exclusion of every explanation other than aerial convection is essential to the proof; but every instance in which a Hospital within the conditions of the theory has not spread the

Appeal.
1904.

ATTY.-GEN.
v.
RATHMINES
& PEMBROKE
JOINT
HOSPITAL
BOARD.
Fitz Gibbon,
L.J.

Appeal. disease is affirmative evidence that the theory is not true, and that
 1904. the danger is either contingent or has some other cause.

ATTY.-GEN. The issue depends upon the examination, in the Baconian
 v. method, of the instances where the disease did not spread from
 RATHMINES Hospitals with those in which its appearance is attributed by the
 & PEMBROKE JOINT plaintiff's witnesses to aerial convection.
 HOSPITAL BOARD.

Fitz Gibbon,
 L.J.

With the exception of the Purfleet case, the cases upon which the plaintiff relies, such as Fulham, Sheffield, Bradford, Nottingham, and Dublin, may be explained, by reason of the character of the neighbourhood and their other circumstances, by causes other than aerial convection for any considerable distance, but the cases proved by the defendants' witnesses against the theory are not open to the converse explanation, and they are very remarkable, and persuasive that even under unfavourable sanitary conditions smallpox does not necessarily spread even from large Hospitals in populous localities.

Dr. Hope has been associated with every outbreak of smallpox in Liverpool, where the importations are very frequent, because Liverpool trades to all parts of the world, and the presence of smallpox in New York, Spain, or anywhere else, means an importation of smallpox sooner or later into Liverpool. There are five Hospitals for infectious diseases; he was visiting physician to the largest of them—Park Hill—for five years, during which it was used for smallpox, and as many as 200 smallpox patients have been in it at the same time. For some six or seven years past, up to a recent outbreak, Park Hill was not used for smallpox, and during that time there were cases of smallpox in its vicinity, but while it was used for smallpox Dr. Hope had no reason whatever to think that it was ever a source of infection to the people in the locality. It was used again for smallpox within the last eighteen months on account of a recent prevalence of the disease; it is in a far more thickly populated district than Rathmines or Pembroke. It has 12 acres attached.

The circumstances of Priory Road Hospital, for forty patients, and the district in which it is situated, are very much the same as at Clonskeagh, so far as the diffusion by aerial convection is concerned, and he has never had occasion to think that infection was disseminated from it.

The Port Sanitary Hospital was intended to take sea-borne cases of infection; it has been for some time used for typhus patients, not smallpox; when a case of smallpox arose within a quarter of a mile, the District Medical Officer wrote to ask how many cases of smallpox there were in the Hospital, as he was anxious to verify the aerial convection: he got the answer—"None at all, and had not been for a long time." Dr. Hope observes that if, by chance, there had been a case there, it would have been an argument for aerial convection, and would have been quoted as such.

He emphasizes the duty to isolate smallpox Hospitals as far as possible, not because of the fear that a cloud of infection will arise from the Hospital, and be carried by the winds to settle in some other part of the town, but because of the extreme difficulty of keeping trespassers and friends from coming close.

Having given the subject very careful consideration, and seen the place, his answer to the question whether the Clonskeagh Hospital would be a source of danger to the neighbourhood is, "None whatever"; though he adds that it might be an advantage to do away with the small cottages, from the risk of the children living there trespassing on the grounds, or other reasons. He knows nothing to support the theory of a quarter of a mile, and he says, with all deference, that conveying infection for two miles by air alone borders on the absurd; no mischief within his knowledge has ever resulted, given reasonable air space; he would not say there is no risk of spreading through the air, for the probability is that, like every other disease, like typhus and many others, the contact is through a short medium of air space, but he is perfectly convinced that a Hospital might be conducted at Vergemount without the slightest risk to the neighbourhood, provided it is conducted with due regard to discipline.

Dr. Marsden, for twelve years Health Officer for Birkenhead, with a population of 115,000, at present has two Hospitals adjacent to each other, one for ordinary infectious diseases, and the other for smallpox; but for twenty years before 1900, an old Hospital, since pulled down to enlarge the Borough Infirmary, had been

Appeal.
1904.
ATTY.-GEN.
v.
BATHMINES
& PEMBROKE
JOINT
HOSPITAL
BOARD.
Fitz Gibbon,
L.J.

Appeal. used for smallpox. It was in a congested district, with a population within the quarter-mile radius of nearly 9000, and about 3000
 1904. within one-eighth of a mile; houses within 72 feet; a street on
 v. every side, and the Borough Infirmary within 43 yards; he had
 RATHMINES & PEMBROKE entire control of it for over three years: 356 smallpox cases were
 JOINT treated there, thirty-seven of them in his own time. Though
 HOSPITAL BOARD. notoriously used for smallpox, and the only Hospital in the Borough
 Fitz Gibbon, at the time, it had no deterrent effect whatever on the develop-
 L.J. ment of the surrounding ground. He made a very careful investigation into the records of the Hospital and of the Town; every case that occurred in the Borough has been accounted for in other ways, but not a single case has ever been known to have originated from that Hospital, either in the Borough Infirmary or in the adjacent Hospital, and the physicians of that adjacent Hospital—only a few yards away—never raised the slightest protest, or showed in any way that they feared that there was the slightest danger from it to their patients. His experience is entirely against the theory of aerial convection, though it is one which requires serious consideration, but not yet sufficiently proven to act upon as a scientific settled fact.

His specific evidence as to Clonskeagh is particularly valuable, because the site there almost corresponds—is almost identical—with the site of the new Hospital for smallpox which has been erected at Birkenhead; his evidence is in these words—

“I think it is an excellent site for the purpose, for the degree of Hospital that is to be put on it; it stands on a gentle eminence; it is bathed in sunlight and air, and it has sufficient air zone to make it, to my mind, an ideal site for the purpose.”

The new Hospital at Birkenhead has treated 107 cases within the last twelve months; the population within the quarter-mile is 352, within the half-mile 2600, and there has not been a single instance where the disease has spread from that Hospital to any person, and every case has been traced to its source.

Dr. Peers, of Wolverhampton, with a population of 100,000, has one iron pavilion with twelve beds for the treatment of smallpox in the immediate vicinity of a scarlet-fever pavilion in

the same Isolation Hospital. The whole Hospital site is only three acres, on which, besides the two iron pavilions, there are two brick pavilions for scarlet-fever. Within one-eighth of a mile there are forty private houses; within the quarter-mile there are between 150 and 200 houses, in addition to several large manufactories; within three-eighths of a mile there are several thousand houses, and the half-mile radius includes one quarter of the population of the Borough; the nearest dwelling-house to the Hospital is seventy yards off; at one side there is a very important public thoroughfare within seventy feet, and a public footway is at the other side. The smallpox pavilion has been used since May, 1894; in that year they had sixty-seven cases, fourteen and fifteen at one time; while these sixty-seven cases were under treatment there were 883 scarlet-fever cases in the other pavilion, 41 yards off; in 1895 there were seven; 1896, three; 1900, four; and since December, 1902, seven cases of smallpox. It was Dr. Peers' duty to trace their origin; it was invariably traced to importation. There never was any case that could only be explained by aerial convection; the nearest case to the Hospital was between the quarter and half-mile, and was a case of contact with other people. In 1894 one case of smallpox occurred in a scarlet-fever patient who was in a wooden annexe then absolutely adjoining the smallpox Hospital, and it was traced to direct communication, the convalescent scarlet-fever patient having walked over to the smallpox annexe, and conversed through the window with a smallpox patient. Since the smallpox pavilion has been in its present position there has never been a case of smallpox within the quarter-mile radius. As to Clonskeagh, having seen it, he says—

“It is much more favourably situated than ours. It is in a much better locality.”

Mr. Brooke, Town Clerk of Ossett, Yorks, which has a population of 13,000, was examined for the defendants, and owing to the litigation in that case his evidence is especially important.—In 1893 the Local Government Board refused an application for a loan of £3000 to erect a smallpox Hospital for eighteen patients on the ground, as they alleged, that the site was not a proper one; considering it the best site in the Borough,

Appeal.
1904.

ATTY.-GEN.
v.
RATHMINES
& PEMBROKE
JOINT
HOSPITAL
BOARD.

Fitz Gibbon,
L.J.

Appeal.
1904.
ATTY.-GEN.
v.
RATHMINES
& PEMBROKE
JOINT
HOSPITAL
BOARD.
Fitz Gibbon,
L.J.

the Corporation erected the Hospital for sixteen beds, notwithstanding. The first patient was admitted in 1896, and two adjoining owners sued for an injunction. The dwelling-house of one plaintiff, and a workshop where twenty people were employed, were 123 yards from the Hospital; the land of both plaintiffs was within from 45 to 50 feet of the Hospital, and the other plaintiff resided in a large mansion 292 yards away. Within the quarter-mile radius there were 116 houses, 479 residents, a mill employing about 100 hands, and schools attended by fifty scholars; within the half-mile there were 315 houses, and a population of 1500. The action was tried before Romer, J., during four days in March, 1898. We have been supplied with a *verbatim* report of the evidence and judgment. Romer, J., dismissed the action with costs, because in order to sustain it the plaintiffs must have established a strong case of probability—or, as is sometimes said, the extreme probability—that the apprehended mischief will in fact arise: the evidence he described as undoubtedly most conflicting on most material points; he declined to weigh one body of expert evidence against the other, but he stated the short result that the plaintiffs had not established to his satisfaction a case justifying an injunction; he gave no opinion as to the point of aerial convection, but he thought so far in favour of the plaintiffs that a Hospital may be a source of danger to those living near, certainly if badly conducted; further, that, for some reason, when a smallpox Hospital is established there is a tendency for smallpox cases to arise in the immediate neighbourhood where the Hospital is a large one, where a considerable number of acute cases are placed together, and where the immediate neighbourhood is crowded, and especially if it be ill-ventilated. On the other hand, he was not satisfied, if a smallpox Hospital be placed in an open and well-ventilated site with few persons living near, that then it is, when well conducted, a substantial source of danger or a legal nuisance to persons living within 100 yards of it, or even at a lesser distance, and certainly not if the Hospital be a small one.

Mr. Brooke states that since that judgment houses have been built within the quarter-mile radius in about the same ratio as in any other part of the town, including two new streets and four

other cottages; the total area of the Hospital site is 4A. 1R. 36P., about one-third of the Clonskeagh site. There was one patient in 1896; there were ten in 1902, and not a single one came from within either the quarter or half-mile radius. From 1881 to 1896 a wooden structure on the same site had been used as a smallpox Hospital, and eighty-six cases of smallpox were treated in it; not a single case ever arose within the quarter-mile radius; only one within the half-mile radius, and the medical officer was forced to the conclusion that it arose out of sorting foreign rags.

The case of Cork Street Hospital brings out most strongly not only the conflict of expert testimony, but the contrast between evidence of opinion and evidence of fact.

Dr. Roche treats the outbreak of smallpox in 1894 in the neighbourhood of Cork Street as the proved and accepted result of aerial convection from the Hospital itself. He denounced the reception of smallpox cases in Cork Street in the public Press, and he states the result of their reception to have been that "the disease spread round Cork Street, and affected the whole south side of the City."

Dr. Day, for twenty years in charge of that Hospital, was examined for the defendants. He has had under his charge practically every form of infectious disease except cholera and plague. In the epidemic of 1894 he had about 130 smallpox patients treated at the same time within the confines of the Hospital, and in 1894 and 1895 the total number was about 1000. In other years the numbers were—1885, 3; 1888, 20; 1889, 1; 1892, 2; 1893, 1; 1897, 3; 1901, 7; and 1902, 3. Since then, the Corporation has established an Isolation Hospital at the Pigeon House, and no evidence has been given upon either side with respect to it or its surroundings. Dr. Day's evidence is that in 1888, when he had 20 cases, no case arose in the vicinity of the Hospital, nor was there a case in its vicinity in any other year except 1894 and 1895, when the epidemic was all over Dublin. In the commencement of that epidemic, and until his hands became too full to pursue the investigation, he traced every case, over 200 in number, to direct contact, and he found that the disease began in the north side of Dublin, was brought to the south side

Appeal.
1904.

ATTY.-GEN.
v.
RATHMINES
& PEMBROKE
JOINT
HOSPITAL
BOARD.

Fitz Gibbon,
L.J.

Appeal. by people removing from the north, or occurred with people
 1904. actually engaged in dealing with smallpox cases or infected
 ATTY.-GEN. articles at the north side. He mentions a number of instances
 v. which show the practical impossibility of preventing contact, and
 RATHMINES & PEMBROKE of negating propagation from other causes than aerial convection,
 JOINT during an epidemic; and, having seen the Clonskeagh site, he
 HOSPITAL states that he cannot see why there should be any danger from it
 BOARD. to the inhabitants of the district, assuming the Hospital to be
 Fitz Gibbon, properly managed and properly isolated.
 L.J.

The only case relied on for the plaintiff to prove aerial convection, where the range was at all as great as the zone of isolation round the intended Hospital at Clonskeagh, was the Purfleet case: in most of them the distances were comparatively small. In none of them were the conditions at all so favourable for convection as at Cork Street, or in several of the other cases where the defendants witnesses have proved that the disease did not spread from the Hospital, nor even appear near it. The Purfleet case has not been accepted as conclusive, and if regarded as conclusive, it would be in conflict with all the negative instances to which I have referred. It is weakened as presumptive evidence by the fact, which Dr. Thresh incidentally mentions, that smallpox existed in Essex in many places, and at different times, during its prevalence at Purfleet, and as a juror I should prefer to account for its prevalence there by infection from some neighbouring district, rather than by its crossing the Thames, or by the far-fetched suggestion which he attributes to Dr. Newshall, that it was carried over by somebody who swam across the river. In the Fulham and Dublin maps there are curious instances of places where smallpox seems to break out, or to spread, on every possible occasion, and Purfleet may be one of these. But be this as it may, the Hospital Ships which accommodate the smallpox patients of London are a very different source of infection from the Hospital that receives those of Pembroke and Rathmines, and the Purfleet case alone cannot sustain the injunction here.

Local experience is against the inference of danger; from no one of the six or eight patients hitherto treated at Clonskeagh has any infection spread, even within the Vergemount area, and

the improbability of its spreading is supported by the evidence of Dr. Cranny, Dr. Willis, Dr. Browne, and Dr. Chapman. No case that could be attributed to aerial convection was seen by any of them from 1878 to the present time, though epidemics have occurred, and though at one time a great many smallpox cases were kept and treated all in one ward of the Charlemont Street private Hospital.

It seems probable that the dread of smallpox is to a great extent the result of tradition; that scourge of the eighteenth century retains its terrors for those who do not realise that it has been deprived of most of its dangers. Vaccination is not only a preventive—it also modifies the disease. The evidence even of Dr. Thresh is that vaccination and re-vaccination at proper intervals confer “practical immunity.” In applying the maxim *sic utere tuo ut alienum non laedas*, the duty of reasonable precaution for one’s own protection is not to be ignored. An Isolation Hospital reduces the risk for every inhabitant of the district—it is in fact a necessity; and though the individual must be protected, the public advantage should not be forbidden unless the danger and injury to the individual are clearly proved.

Were I an insurer, the evidence in this case would satisfy me that the risk to any individual of infection by smallpox travelling from the proposed Hospital at Vergemount to those outside the hospital area is less than the risk of their catching any of the other infectious diseases which are treated there, and it is conceded that this risk is not actionable. For myself, taking numbers, death-rates, and relative frequency into account, and considering the protective effects of vaccination, I should prefer to take the chance of smallpox rather than those of typhoid, diphtheria, or even scarlet fever.

To hold this smallpox Hospital *per se* a nuisance on the theory of aerial convection would be the first break in a line of decisions in which the very issue which we have here to try has been held “not proven.” In some, if not all, of those cases the evidence of danger was stronger than here. In *Fleet’s Case* (1), for example, the source of infection was an open camp, no doubt occupying a

Appeal.
1904.

ATTY.-GEN.
v.

RATHMINES
& PEMBROKE
JOINT
HOSPITAL
BOARD.

Fitz Gibbon,
L.J.

Appeal. large acreage, and situated on a high table land, but containing
 1904. from 1000 to 1200 patients, and the zone of isolation was only a
 ATTY.-GEN. belt of open land fifty yards wide, where aerial convection would
 v. seem to have every chance of coming off.
 RATHMINES
 & PEMBROKE
 JOINT
 HOSPITAL
 BOARD.

Fitz Gibbon,
 L.J. Though depreciation of the plaintiff's property has been alleged,
 specific evidence has been given to disprove it. The site of the Hos-
 pital is not much more than half of the land which was bought by
 the defendants for the purpose of erecting it. They paid £3500
 for 26 acres; they appropriated 14 acres to Hospital purposes, and
 they put up the remaining 12 acres for sale by public auction, in
 six lots, comprising some existing dwellings, and what was
 described as valuable building ground: the particulars candidly
 stated that the property for sale was portion of that acquired by
 the Rathmines and Pembroke Joint Hospital Board for the pur-
 pose of an Isolation Hospital. Mr. North, who conducted the sale,
 considered that the lands realised their whole value, and the 12
 acres brought £2310 in addition to five per cent. auction fees, and
 Mr. North and Mr. Gray, of the firm of Battersby and Co., after
 examination of their books as to the houses let and to be let in the
 neighbourhood, agreed in the conclusion that the value of house pro-
 perty in the neighbourhood had not been affected or depreciated.
 There is no evidence that building has been checked since
 Vergemount was acquired for the purposes of a Hospital, or even
 since this action was commenced. The evidence of several of the
 English witnesses supports this conclusion by showing that the
 establishment of the Hospitals to which they have referred has
 not checked building in their vicinity. While I do not
 believe that the establishment of this Hospital can be other-
 wise than objectionable to the residents in the neighbourhood,
 and particularly to the plaintiff and her tenants, and though
 serious depreciation clearly proved might indicate a general
 apprehension of actual danger, there is no evidence of it in the
 present case.

In holding that this action must be dismissed, on the
 ground that no real danger has been proved, I confidently
 hope that future experience will justify our declining to accept
 theory as against proved facts, or to sanction alarm, however
 natural, which is based only upon theory; as the result of five

years experience has justified the similar decision of Romer, J., in *Harrop v. Ossett Corporation* (1). *Appeal.*
1904.

We have no alternative but to dismiss the action with costs, here and below, and to direct that the costs be taxed in accordance with the Public Authorities Protection Act. *ATTY.-GEN.*
v.
RATHMINES
& PEMBROKE
JOINT
HOSPITAL
BOARD.

WALKER, L.J. :—

The defendants are the Joint Hospital Board for the Rathmines and Rathgar Urban District, and the Pembroke Urban District. The Board was duly formed in 1900. The object of their incorporation is to provide an isolation hospital for the reception of infectious diseases. With that object they acquired a site conveniently situated for both districts called Vergemount, and the site has been sanctioned by the Local Government Board. The lands comprise twenty-six acres, and upon them is Vergemount House, which is intended to be used for the resident doctor's residence, and the nurses' home. They sold portion of the lands and certain dwelling-houses, and retain 14 acres. In view of the threatened epidemic of smallpox in 1902, they erected an iron temporary hospital for the reception of smallpox patients with twenty beds, and they propose, in substitution, to erect a permanent hospital for infectious diseases, including smallpox. The two districts have a population of some 58,300 persons, and 9000 dwelling-houses.

There are 137 houses within the quarter-mile radius from the proposed hospital, with a population of 753, and within the half-mile radius there are 422 houses, and four institutions, with a population of 2682; a residence called Prospect House is 100 yards from the proposed site. Another—Clonskeagh House—a public-house, is 130 yards from it. The plaintiff's house is 281 yards, and there is a terrace called St. James'-terrace, the plaintiff's property, the nearest house of which is a little more than 213 yards distant. The rental of this terrace is about £755 per annum. The proposed site is on well ventilated fields, which have a considerable elevation above the Clonskeagh-road, and small group of cottages along it, and there is ample room for the construction of enclosing walls round the hospital for the purpose of excluding trespassers, and prevention of immediate contact.

Appeal.

1904.

ATTY.-GEN.

v.

RATHMINES
& PEMBROKE

JOINT

HOSPITAL
BOARD.

Walker, L.J.

The two urban districts are mainly inhabited by people of the better class, and they are well vaccinated districts. It is stated that the two most congested districts are Irishtown and Harold's Cross, both remote from the site. During the recent epidemic between March and June, 1903, eight cases of smallpox were treated in the temporary hospital in Vergemount. There were at one time, for a short period, six cases under treatment, and it does not appear that any case occurred in the vicinity of the hospital. This is a *quia timet* action, and there is no dispute about the law applicable to it. The plaintiff must establish the existence of a reasonably well-founded apprehension of real danger to property or public health from the mere existence of an hospital of the kind proposed for the reception of smallpox patients within the distances to dwellings which are proved. It is not enough to show a sentimental danger, or that an hospital will be disagreeable to the residents in the neighbourhood, and in that sense a probable or possible injury to property. It is not alleged that the establishment and use of this hospital for other infectious cases, such as diphtheria, scarlatina, or typhoid, can be interfered with. In such cases it is admitted that sentiment and natural repugnance must give way to the public good. The case is limited to smallpox, and the danger of infection from it. It is not disputed that if the plaintiff makes out her case, the Court is not entitled to weigh against her rights the good to the whole district accruing from the stamping out an epidemic of smallpox by the establishment of an isolation hospital. The case of the plaintiff is that the infection from smallpox is of such a character that though every reasonable precaution in the way of the construction of the hospital be taken, and every reasonable precaution be adopted to prevent contagion, immediate or mediate, still, notwithstanding walls and windows and ventilation, infection will be carried from it by some agencies not precisely known to medical science, or will, in some way, be communicated to a distance round the hospital within a radius of one-quarter mile, or possibly a half-mile or a mile—at all events to a distance which would be a danger to health and property within the distances at which people live, and property is, in the present case.

That is the plaintiff's case, but I think she is justified in

saying that she is entitled to an injunction if she establishes the existence of the danger, though she may fail to prove the mode by which it works. The case of the plaintiff was mainly rested upon the evidence of four medical gentlemen of position: Dr. Thresh, Dr. Anthony Roche, Dr. M'Weeney, and Sir J. Moore. In the evidence of all of these gentlemen, the theory of aerial convection played an important part, and in fact they were put forward as its advocates. As regards Dr. M'Weeney and Sir J. Moore, they disclaimed any knowledge of the theory derived from experience, but from reading and statistics furnished from Fulham, Sheffield, and Bradford, they stated they were believers in it, and they state that the danger increases in proportion to the number of patients treated.

Dr. Anthony Roche, in addition to reading, relied upon experience derived from investigations in connection with the outbreaks in Dublin in 1893 and 1894, and the treatment of patients in Cork-street Hospital then, and he stated that this treatment had resulted in a great increase of cases in the vicinity of the hospital, and illustrated his evidence by a map, on which were drawn concentric circles round that hospital, and spots showing the cases that occurred in the neighbourhood. This map shows cases to have occurred on both the north and south sides of the city, but it is remarkable that these cases appear to have occurred in poor and congested districts of the city, and on one side of the hospital there is a space apparently free. This appears from the map with reference to the evidence of Dr. Day, the doctor of the hospital. I by no means say that evidence of this kind does not suggest an inference that there is a danger of infection arising in the immediate vicinity of an hospital in which a large number of patients are being treated, especially if it be situate in a poor or congested district, and it appears that some 1000 cases were treated in Cork-street in the epidemic of 1893 and 1894, but having regard even to that map, and the evidence of Dr. Day, which I shall after notice, I do not think much support is given by the map to the aerial theory. Dr. Thresh, however, is the witness on whose evidence the case of the plaintiff mainly rests. He is a gentleman of position, the medical officer of health for the Essex County Council, and he has been for a number of years the

Appeal.
1904.

ATTY.-GEN.
v.

RATHMINES
& PEMBROKE
JOINT
HOSPITAL
BOARD.

Walker, L.J.

Appeal.
1904.
ATTY.-GEN.
v.
RATHMINES
& PEMBROKE
JOINT
HOSPITAL
BOARD.
Walker, L.J.

persistent advocate of the theory in support of what he gives evidence. He has been a witness in many cases, but up to the present has not succeeded in inducing any Court to adopt the theory as a basis for its judgment. He says that though he had been investigating the subject since, at all events, 1884, when hospital ships were placed in the Thames near the Essex shore, and had believed in the theory from the Fulham statistics and others, it was not till 1901 that he was able to supply actual proof for the theory, and this proof he derives from the fact of patients being sent down from London in special ambulance boats, and placed in ships which were moored in the river at the distance of 700 yards from the Essex shore, and fifty from the Kent shore, which latter shore, however, was marshy and sparsely inhabited; and he says that when sixty or seventy cases were in the ships, outbreaks occurred on the Essex coast, especially in Purfleet, and that outbreaks and deaths occurred as the ships were used, and while the disease prevailed, and he professes to have satisfied himself by his investigations that there had not been any communication between the ships and shore. He illustrated his theory by circles round the ships, and says that within the three-quarter-mile radius 10 per cent. in the parish were attacked, while only 3 per cent. were attacked within the three-mile radius, and he makes the prevailing winds a factor in that spreading. He mentions that there was an hospital in his county in which they had 480 patients, but it was not till they had 200 that he found the disease spreading round—a considerable aggregate of patients appears to be essential in his view, and indeed in the view of all the witnesses for the plaintiff. So earnest is he in his theory that he says there would be scarcely any appreciable danger from contact in the immediate vicinity of an hospital, and this would mean carelessness, and he also tells us, what seems to an ordinary mind hardly consistent with his theory, that it would be safe to have from 200 to 250 people within the quarter-mile radius, and 500 within the half-mile radius. He admitted that other doctors of eminence disagreed with his view, and had alleged that there had been in the case of the hospital ships surreptitious intercourse with the shore. I may here mention that all the medical men agree that vaccination and re-vaccination afford practically complete immunity. He dis-

approves of the proposed site, founding his disapproval on his theory.

The case of the plaintiff was encountered by a body of testimony from witnesses certainly from experience competent to speak. They include the medical officers of health for the typical places of Liverpool, Birkenhead, and Wolverhampton.

Dr Hope, of Liverpool, speaks of five hospitals there. Park Hill (which has since been superseded by the Fazakerly Isolation Hospital, outside the city boundary) had 450 beds and 200 patients at one time. The nursing department was 100 yards from nearest dwellings, and the wards 200 yards. Priory Hill Hospital was circumstanced much like Clonskeagh, 100 yards from a roadway. He would like in all cases, where practicable, to get a large area round every hospital so as to be on the safe side, and the Local Government Board act on that idea in the rules they publish.

He entirely disbelieves in the aerial theory of infection, and from his experience attributes the spread of the disease to contact, mediate or immediate. He is aware of the statistics from Fulham, Sheffield, and Bradford, but questions their sequence, owing to their circumstances, and he says the aerial theory has not advanced, and the more it is investigated the less likely it is to prove correct.

Dr. Marsden, of Birkenhead, supports the same view. He speaks of an hospital in which a number of cases were treated in 1876-1895, and there was a population of from 2000 to 3000 persons within one-eighth of a mile. There were 167 cases treated in hospital within the last twelve months, and every one has been traced, and there was no instance of a case spreading from the hospital. The Clonskeagh site, he says, is an ideal one, and corresponds with the site of his present hospital, where the population is 352 in the quarter mile radius. He also entirely disbelieves in Dr. Thresh's theory. Mr. Peers, from Wolverhampton, gives the statistics and particulars from the hospital there, and says the Clonskeagh site is much more favourably situated than his, and no case occurred within the quarter-mile radius of it, and it is only 124 feet from the scarlet fever hospital on the same site of 3 acres. The town clerk of Ossett gives evidence

Appeal.
1904.

ATTY.-GEN.
v.
RATHMINES
& PEMBROKE
JOINT
HOSPITAL
BOARD.

Walker, L.J.

Appeal.
1904.
ATTY.-GEN.
v.
RATHMINES
& PEMBROKE
JOINT
HOSPITAL
BOARD.
Walker, L.J.

as to an hospital with sixteen beds, and having 116 houses, with 479 residents within the quarter-mile radius; no case comes from the quarter-mile radius.

Dr. Day, of this city, is an important witness, as he has been for twenty years in charge of the Cork-street Hospital, in which smallpox cases were treated until the isolation hospital at the Pigeon House was recently established. In the epidemic of 1894, 1895, 1000 cases were treated in Cork-street, and he traced the first 200 of those cases to infection from the north side, after which he ceased his investigations, and he says that such cases as occurred in the vicinity of the hospital occurred in the poorest and most congested districts of Dublin, where each case is itself a source of danger from the habits of the people and the desire to conceal the disease. He disbelieves in the theory of aerial convection, and in the 200 cases which have occurred in the new isolation hospital he has been able to trace every one of them to such contact, and from his experience he states that the proposed site will not be a source of danger. I do not think it necessary to refer to the evidence of six other medical men, who were examined to prove their disbelief in Dr. Thresh's theory, and their belief that the proposed site will not be a danger to the public health if the hospital be well conducted and reasonable precautions taken. The experience of those witnesses, who negative the spread of infection in the cases and under the circumstances they speak of, seems to me more persuasive against the theory.

In that state of the evidence, what course is open to the Judge, who is not at liberty to form an opinion as an expert, but is bound to act on evidence?

If the result is to leave him in doubt, he cannot in a *quia timet* action decide that the case for the plaintiff has been made out. Since 1884, at all events, cases like the present have been brought before Courts of Equity, in which plaintiffs have sought injunctions without success. In the first of them Bowen, L.J., says that "the voice of science is still uncertain; that, no doubt, sooner or later science will discover and assert with confidence whether infection blows across hills and valleys." I fear that the experience of twenty years has left the voice of science uncertain still.

It would not be satisfactory to dispose of the case without referring to the decided cases, but really they each turn upon their own facts. *Fleet v. Metropolitan Asylums Board—The Darenth Camp Case* (1) seems the first. It was a private action, and the house of plaintiff was 685 yards from the camp, which was a convalescent hospital, accommodating some 1200 patients. There were some houses 300 yards away, and part of plaintiff's property was as near as 80 yards, and the clear space round the camp was only 50 yards. Evidence was given as to the spread of smallpox occasioned by proximity of London hospitals. There was no evidence, save one doubtful case, of infection from the camp. Pearson, J., decided that an injunction should not be granted, as the evidence was conflicting, and the opinion as to aerial theory only theoretical, and not the result of experiment or observation, and he would not conclude that this hospital would be a centre of infection, because London hospitals might. His decision was affirmed; Bowen, L.J., making the observation to which I have referred, that the voice of science was still uncertain. The plaintiff in the present case contends that the scientific discovery has now been made.

The case of *Bendelow v. Guardians Wortley Union* (2), before Stirling, J., turned upon the finding of the referee. Dr. Murphy also happened to be a strong believer in the aerial theory, as he reported that irreparable damage might result. An interlocutory injunction was granted because of his opinion, founded on that theory, though the distance proved would prevent contact.

The case of *The Attorney-General v. Corporation of Manchester* (3) is valuable, for the considered judgment of Chitty, J., refusing an interlocutory injunction in a *quia timet* action. The site chosen was part of a cemetery, consisting of 8 acres, to be fenced round with a high wooden fence. The hospital would be 200 yards from a frequented highway, 90 yards from a much used burial-ground, 180 yards from the nearest mortuary chapel, 413 yards from the Registrar's office, and there were fifteen houses within the half-mile radius, the nearest being 256 yards distant.

(1) 1 T. L. R. 80; on app. 2 T. L. R. 361.

(2) 57 L. J. Ch. 762.

(3) [1893] 2 Ch. 87.

Appeal.
1904.
ATTY.-GEN.
v.
RATHMINES
& PEMBROKE
JOINT
HOSPITAL
BOARD.
Walker, L.J.

Appeal. The report states, "The medical evidence on both sides was conflicting and voluminous, and included the elaborate reports to the
 1904. Local Government Board, 1885-1886 (the Fulham smallpox
 v. hospital), and 1887-1888 (on the epidemic of smallpox at Sheffield),
 RATHMINES which was illustrated by spot maps and concentric circles, to show
 & PEMBROKE that smallpox hospitals were a centre of infection." Chitty, J.,
 JOINT which was illustrated by spot maps and concentric circles, to show
 HOSPITAL that smallpox hospitals were a centre of infection." Chitty, J.,
 BOARD. refused the injunction, adopting as the principle that it lay on
 Walker, L.J. the plaintiff to show a well-founded and reasonable apprehension
 of danger to the public health. He mentions "the plaintiff's
 counsel have not relied on the theory of aerial dissemination of
 the disease; that theory is not yet established." He adds later :
 "Each case depends on its own facts; other cases may afford
 assistance to the experts, but they are not guides which the Court
 is bound to follow," and at the end of the judgment he makes an
 observation, which will commend itself to any Judge having
 the responsibility of considering a case of this kind. He says,
 "In parting with the case, I think it right to say that the Court
 ought to exercise great caution before it accepts any general
 proposition of fact which might tend to the closing of many a
 well-ordered smallpox hospital in the country."

In the case of *Attorney-General v. Guildford Joint Hospital Board* (1), decided in 1895, before Kekewich, J., the plot in question was 100 yards across, and surrounded by a common, on which children played and cows fed. The house of a market gardener was 60 yards from the plot, and there were houses 110-335 yards away. The aerial theory was relied on, and it was asserted it had gained ground. The learned Judge refusing the injunction said:—"If it was ever proved scientifically and beyond all reasonable doubt that infection could be conveyed possibly a quarter mile, or a half mile, or even a mile, in spite of brick walls, doors, and windows, it might be a question whether something should not be done to deprive the public from the blessing arising from such an hospital as this."

The last reported case decided in March, 1890 (*Harrop v. Ossett Corporation* (2)), is of great importance. It related to an hospital, designed for eight beds, in Ossett. It was a private action. The hospital grounds were 290 yards by 301 wide. The

(1) 12 T. L. R. 54.

(2) 14 T. L. R. 308.

rag and woollen refuse stores of Wilcocks were 150 yards away, and Rock House 250 yards. Nine doctors were examined for the plaintiffs, including Dr. Murphy, the referee in the case before Stirling, J., and the aerial theory was relied on. The doctors do not seem to have agreed as to the distance it would travel, and the number of patients to be dealt with was considered an important factor, danger from proximity to an hospital was insisted upon, and the rules of the Local Government Board were relied on. For the defence three eminent medical men were called. The aerial theory was rejected as not proved, but it seems admitted by them that in the immediate vicinity of an hospital where there was an aggregation of cases there might be an incidence of smallpox, but that the condition of the district and the administration of the hospital should be taken into account. One of the witnesses, Dr. Ricketts, mentioned the case of the outbreak at Purfleet, and a barge being near it on the river, and said the outbreak was traced to other causes than aerial convection. Mr. Justice Romer dismissed the action. He agreed there might be a danger of contagion to persons in the vicinity of a large hospital containing a number of acute cases and situated in a crowded and ill-ventilated neighbourhood. His language seems to me apposite to the present case. He says:—"Now in the present case undoubtedly the evidence is most conflicting on most material points. I do not intend at this point to go through the details of that evidence, certainly not to, as it were, weigh one body of expert evidence against the other body. I will only state that the short result in my mind is that the plaintiffs have not established to my satisfaction a case justifying an injunction. I give no opinion as to a point no doubt of considerable interest to experts, the point about which the experts differ so much, and which is often referred to as aerial convection, but I do think, so far in favour of the plaintiff's case, that on the balance of testimony a hospital may be a source of danger to those living near or in the immediate neighbourhood, certainly if it is badly conducted. Further, I think that, for some reason or other, when a smallpox hospital is established there is a tendency for smallpox cases to arise in the immediate neighbourhood in certain cases, that is to say, as far as I can gather, in cases where the hospital is a large

Appeal.
1904.

ATTY.-GEN.
v.
RATHMINES
& PEMBROKE
JOINT
HOSPITAL
BOARD.

Walker, L.J.

Appeal.
1904.
ATTY.-GEN.
v.
RATHMINES
& PEMBROKE
JOINT
HOSPITAL
BOARD.
Walker, L.J.

one, that is to say, where there is a considerable number of acute cases placed together, and where the immediate neighbourhood is a crowded one, and, I think, especially if the neighbourhood be an ill-ventilated one. On the other hand I am not satisfied if a smallpox hospital be placed on an open and well-ventilated site, with few persons living near, that then it is when well-conducted a substantial source of danger or a legal nuisance to persons living even within 100 yards of the hospital, or even at a lesser distance, and certainly not if the hospital be a small one, like the one in the present case of eight beds. In the case before me, looking at the site of the hospital, that it lies high, is well ventilated, and is on very open ground, and considering, as I do, the nature and small extent of the hospital, its size and arrangements, and the way in which it will probably be used, I am not satisfied that there is any substantial source of danger to the plaintiffs, certainly none proved which would sustain an injunction." He seems to me almost speaking in the present case.

We were much pressed by an argument that the defendants had not attempted to procure a site outside their district, and it does appear that they considered erroneously that they were limited to their own district, but that does not determine the case for either side any more than it would have helped the defendants if they had procured one outside their district which involved danger to public health. Nor does it determine the case for the defendants that the site has received the sanction of the Local Government Board, though it is important that this responsible body has considered that no danger to public health follows from the adoption of it. As regards the theory of aerial convection, upon which the plaintiff really and probably wisely rests her case, it is said that theory has now been established and must be accepted as a scientific fact. If it has been, it is by the investigations made by Dr. Thresh in the case of the hospital ships in the Thames. But are we able, or, perhaps, I should say, coerced to find it has been established? We have still the large divisions in the medical world. Theory against theory, experience against experience, and bearing in mind the caution contained in Mr. Justice Chitty's judgment, I think it would not be safe to assume the existence of a

reasonable apprehension of real danger founded upon such a theory. The plaintiff is, however, entitled to argue that, putting aside the theory, she has made out the existence of real danger by the mere fact of the hospital being built on this proposed site, and this seems to be the foundation of the Vice-Chancellor's judgment. I think, in order to come to a sound conclusion on that subject, we must consider the district, its nature, and probable needs, and the character of the site. Here the site is open and well ventilated. The district is on the whole a well-to-do one and a well-vaccinated one, and its probable needs, as we collect them from the facts, are fixed at—as the extreme limit—fifty beds. We must assume the hospital will be conducted with all reasonable precautions. We have not to deal with the hospital in any other character than a smallpox one, and, upon the whole, I cannot say that the plaintiff has proved a real danger to persons residing within the distances from the hospital proved in the present case, or any such danger to property as would justify an injunction.

Appeal.
1904.

ATTY.-GEN.
v.
RATHMINES
& PEMBROKE
JOINT
HOSPITAL
BOARD.

Walker, L.J.

HOLMES, L.J. :—

The defendants are constituted by Provisional Order and a Confirmation Statute passed in the year 1900, a board for the purpose of providing, maintaining, and managing a hospital for the reception of cases of infectious disease, to be used by the inhabitants of the two urban districts that include the most attractive portions of the Dublin suburbs. The population of the united district is about 59,000, the bulk of whom belong to the well-to-do classes, living in good houses and in easy circumstances, while a comparatively low death-rate during the last ten years shows that sanitary precautions have not been neglected. Pursuant to the powers conferred on them by the Confirmation Act, and for the purpose of carrying out the object of their incorporation, the defendants, in the month of May, 1901, acquired a site for the proposed hospital, consisting of fourteen acres of land, with a house called Vergemount standing thereon, intended to be used for the medical superintendent's residence and the nurses' home. The Provisional Order contemplated a hospital for the isolation of all kinds of infectious disease; and although this would necessarily include provision for cases of smallpox, an immediate outbreak of

Appeal.
1904.
ATTY.-GEN.
v.
RATHMINES
& PEMBROKE
JOINT
HOSPITAL
BOARD.
Holmes, L.J.

that malady does not seem to have been feared when the site was purchased. Its appearance in Dublin, however, a few months later led them to anticipate the permanent building by a structure of galvanized iron sufficient to accommodate twenty beds. Before this was completed the present action was begun, claiming that the defendants be restrained from building or establishing upon the lands of Vergemount any hospital or hospitals for the reception of persons suffering from infectious diseases.

Notwithstanding the general terms in which the injunction sought for is described, it is, I think, pretty evident that the real ground of complaint is the apprehended dissemination of smallpox from the hospital to the surrounding neighbourhood. I do not find in the evidence even an incidental reference to any other disease, and there is no complaint that the judgment of the Vice-Chancellor is confined to the reception of smallpox patients.

The only question argued in this Court is whether the presence from time to time of smallpox cases in a hospital erected on the selected site is calculated to endanger to a distinct and appreciable extent the health of Mrs. Boswell, her servants, tenants, and other inhabitants of the adjacent district. In considering this question we must be careful not to accept as a measure of danger the fears of the timid and unreasonable. Captain Thompson is of opinion that the mere existence of a smallpox hospital, irrespective of any risk arising from it, would injure the surrounding property. Possibly he is right. I am aware that the terror produced in some minds by a threatened outbreak of the disease is absurdly extravagant, and can only be accounted for by the tenacity with which mankind cling to old ideas, long after the conditions which gave rise to them have passed away. Smallpox was once the most terrible form of pestilence; and in former generations there was hardly a family that had not in the memory of the dead, or on the faces of the living, evidence of its dreadful power. But now that nearly a century has passed since Jenner's great discovery, all this is changed. Vaccination and re-vaccination, according to the evidence of the principal witness for the plaintiff, give practical immunity. Vaccination has been compulsory for forty years; and in Ireland the conscientious objector is unknown. The consequence is that although the disease still occasionally appears

amongst us, it has assumed a much milder type, and it attacks comparatively few. At the same time there is no doubt that in districts where the safeguard of vaccination as well as other sanitary precautions are neglected, smallpox is acutely infectious; and too great care cannot be taken in selecting a site for an isolation hospital.

The evidence given at the trial was very abundant, and it is unnecessary to examine it in detail. Four witnesses called for the plaintiff—two speaking from personal observation and experience, and two giving the result of their reading—have formed the opinion that the hospital which the defendants propose to erect will be a source of danger to persons residing in its vicinity. They tell us that the virus of smallpox is carried by the air in all directions, and that the collection of a number of patients suffering from the disease in the same building will be followed by its appearance in the surrounding neighbourhood. The evidence as to the distance to which infection can be thus transmitted is somewhat vague; but I think I am justified in saying that the area of danger as deposed to by these witnesses would extend to a circle with a radius of half a mile from the hospital as centre. To meet the case thus made, the defendants have produced several medical men, of whom at least five have had great experience, to prove that they have known cases of smallpox numbered by hundreds treated in hospitals surrounded by crowded populations, without any appreciable danger to their health. We are accustomed to the contradictory testimony of expert witnesses. On each side there is a tendency—often an unconscious tendency—to exaggeration. The logical inference from the plaintiff's evidence is that the only safe site for a smallpox hospital is where there are no inhabited houses within the distance of half a mile. Indeed, Dr. M'Wenney said that he would like to see no one residing within a mile of the building. Yet if we turn to the evidence of Dr. Thresh we find that the standard of safety which he has taken for his own guidance allows from 200 to 250 residents within the radius of a quarter of a mile, and about 500 within half a mile. This, he says, although a little higher than that of the English Local Government Board, is generally acted on by the public bodies with which he is acquainted. But, as far as I can see, these are purely arbitrary

Appeal.

1904.

ATTY.-GEN.

v.

RATHMINES
& PEMBROKE

JOINT
HOSPITAL
BOARD.

Holmes, L.J.

Appeal.
1904.

ATTY.-GEN.
v.

RATHMINES
& PEMBROKE
JOINT
HOSPITAL
BOARD.

Holmes, L.J.

figures; and if his own theory were applied, every hospital so situated would be a public nuisance. When asked what would become of the 200 or 250 inhabitants within a quarter of a mile, his answer was noteworthy—"You must exercise a little common sense; you cannot depopulate the whole country for the sake of putting up the hospital." Using to the best of my ability the faculty to which Dr. Thresh appeals, I have come to the conclusion that smallpox can be communicated from one person to another without personal contact—that the virus can be air-borne to some extent; but that it is impossible to say with certainty to what distance the infection can be thus carried. I am satisfied, however, that the estimate of half a mile, or even quarter of a mile, is altogether extravagant. It is not only inconsistent with the mass of evidence given by the defendants, but with the admitted practice in England of building smallpox hospitals on a spot within a quarter of a mile of the residence of 200 or 250 persons.

Dr. Thresh's experience of the ships in the Thames is unconvincing. Previous to the year 1901, there was not merely the possibility but the strong probability of the infection being carried to the Essex parishes opposite the vessels, by the friends of the patients or by the ambulance; and even if I were satisfied that during the last outbreak there was no communication between the ships and the shore, I should still require proof that Purfleet, situated in a county in which there were 2000 cases of the disease, had not some other sources of infection than what was borne by the air across the river. In considering whether a smallpox hospital will be a source of danger when erected, it is impossible to follow any hard-and-fast rule. Much turns upon the circumstances of the particular case; and the conclusion at which I have arrived depends upon matters to which, I think, too little attention has been paid by the plaintiff's witnesses—(1) the actual site; (2) its relation to the neighbouring houses; (3) the character of the united district as a whole; and (4) the probable number of patients requiring treatment. As regards the site, the evidence led me to think that it was not only good in itself, but that no better could be found within the district; and I am confirmed in this view by a visit to the place. It is open, airy, and considerably higher than the village of Clonskeagh. The hospital will stand on 14 acres of

ground otherwise unoccupied, most of which is at present well enclosed, and the rest can be isolated without much expense. The Local Government Board not only sanctioned a loan for the purchase of the lands, but also approved of the erection of the temporary hospital with a full knowledge of its position. This expression of opinion by an impartial and careful branch of the Executive I regard in a case of this kind as very valuable. It is said that a more suitable situation might have been obtained if the defendants had sought for it outside their district, but no evidence of this has been given, and my personal inspection of the locality does not enable me to say where it is to be found. The only real objection is the number of inhabited houses in the vicinity. According to the evidence of Mr. Parry, there are 137 houses inhabited by 753 persons within a quarter mile radius of the proposed hospital; but this population is not equally distributed over the entire area. The nearest house, Prospect, will be 100 yards from the new building; and the second nearest is Clonskeagh House, at the distance of 130 yards. There are very few dwellings within 200 yards; and Mrs. Boswell has no house property closer than 213 yards. Except in the village of Clonskeagh, almost all the houses within the quarter-mile radius—and beyond this limit it is unnecessary to go—are of a good class, most of them being of modern construction, and detached or semi-detached.

Even the cottages in the village, although small and occupied by poor people, are spread over a considerable space, and present a very different appearance from the slums of a large town. It is noteworthy that since the site for the hospital was acquired many new houses have been built in the immediate neighbourhood, including some that are only separated by the highway from St. James's-terrace; and it is probable that the experience of 1903 has tended to remove much of the apprehension that previously existed. The witnesses for the plaintiff seem to have given very little attention to the sanitary condition of the defendants' district as a whole, and the extent to which the hospital is likely to be used for smallpox patients. It is admitted that these are matters of importance, especially the latter. Dr. M'Weeney stated the larger the number of patients in a hospital, the greater the

Appeal.
1904.
ATTY.-GEN.
v.
RATHMINES
& PEMBROKE
JOINT
HOSPITAL
BOARD.
Holmes, L.J.

Appeal.
1904.
ATTY.-GEN.
v.
RATHMINES
& PEMBROKE
JOINT
HOSPITAL
BOARD.
Holmes, L.J.

danger to the neighbourhood, and if there was only a small number, the danger would be reduced proportionately. Yet he also says that he had made no estimate of the probable number, and that he did not take this matter into consideration at all; nor, as far as I can see, was the attention of Dr. Thresh or Sir J. W. Moore directed to it. I propose to consider it with the assistance of evidence given by another witness. Dr. Browne, the medical superintendent of Rathmines, says that the district is very well vaccinated. I think that this is supported by figures given by him. In 1894 and 1895 there was a visitation of smallpox in Dublin, which, compared with other outbreaks in recent times, must be called severe. There were 1000 cases in Cork-street Hospital alone. Rathmines, with its 33,000 inhabitants, is practically a part of Dublin, and there is unceasing intercourse between it and the city. There was at the date I am speaking of not only no isolation hospital, but no public hospital, for the treatment of infectious diseases in Rathmines at all. Smallpox patients were doubtless received in some of the Dublin hospitals; but they were also treated in private hospitals and in their own homes. In these circumstances it might have been expected that the disease would have spread rapidly. We have the precise numbers, as the Notification of Diseases Act was then in force. The epidemic commenced at the end of 1894, going on through 1895, and ending in 1896; and in Rathmines there were ten cases in the first year, forty-two in the second, and two in the last. These are remarkable figures. Dr. Browne seems to have given them for Rathmines alone, although they possibly relate to the united district; but in any case it may be safely assumed that the sanitary condition of Pembroke was at the least as good as that of the adjoining township.

Now if in those years there had been an isolation hospital to which every case of smallpox in Rathmines and Pembroke was removed, how many patients would have been under treatment at the same time on the basis of the numbers I have given? I should say not more than twenty at the most; and as isolation tends to check the spread of the disease, there would have been probably a much smaller number. This inference or calculation is borne out by what has happened since. For eight years after

1896, there was no case of smallpox in the united district; but in the beginning of 1902 it had re-appeared in Dublin, where it evidently caused considerable alarm. The defendants at once took action, and as early as February in that year it procured the sanction of the Local Government Board to the erection of the temporary hospital with twenty beds. Events showed this to be a very liberal estimate. Although ready for occupation in or before June, there were no patients, and it remained empty until the following January, when it was utilized for the reception of other infectious diseases. At length in March last—more than a year after smallpox began to spread in Dublin—there appeared in the townships two cases which were removed to another building on the Vergemount lands. There followed six other cases, all of which were similarly isolated, and none of which came from the immediate vicinity. When the trial of this action took place in June, only two of them remained in the building, both convalescent; and I have no doubt if there had been any further development of the disease, we should have heard of it in this Court. In fact it would be affectation for us to ignore that smallpox then disappeared from Dublin and its neighbourhood. We have thus what seems to me to be convincing evidence that unless the future history of Rathmines and Pembroke will be very different from the past, the isolation hospital, on the rare occasions when it will be needed for the reception of smallpox patients, will be used for this purpose to a very limited extent. Furthermore, I am satisfied that even if I accept the theory of aerial convection as propounded by the plaintiff's witnesses, a few smallpox patients collected together in a building managed with reasonable care is attended with no appreciable risk. The Cork-street Hospital is surrounded by the worst and most congested slums in Dublin. There is a conflict of testimony between Dr. Day and Dr. Roche as to whether the collection of patients therein during the outbreak of 1894 and 1895, when there used to be 130 in the building at a time, did not cause the disease to spread in the surrounding neighbourhood. I do not undertake to decide between them. Smallpox then appeared in all the unsanitary parts of Dublin, and Dr. Roche's map shows that cases were more numerous in some districts at a considerable distance from the hospital

Appeal.
1904.
ATTY.-GEN.
v.
RATHMINES
& PEMBROKE
JOINT
HOSPITAL
BOARD.
Holmes, L.J.

Appeal. than in the locality adjoining. I pass, however, to uncontroverted
 1904. matters.

ATTY.-GEN.
 v.

RATHMINES
 & PEMBROKE
 JOINT
 HOSPITAL
 BOARD.

Thames, L.J.

For many years smallpox patients had been received in Cork-street. In 1885 there were thirty-three cases; in 1888 there were twenty. In neither of these years was there an instance of the disease in the vicinity of the hospital. So, too, in 1894 there were twenty patients in the hospital brought from the northern part of the city before there was a single case from the south of the river. At length cases from that quarter began to come in, and for some time their history was carefully inquired into, with the result of ascertaining the source of the disease and of showing that it did not come from the hospital. I say nothing of a later date after the epidemic house had become very full; but I use the earlier stages to prove that if there is danger, it only arises when the infected are collected together in large numbers. Further proof of this is to be found in some of Dr. Thresh's answers. Speaking of the smallpox ships in the Thames, he says that the outbreaks on the banks began as soon as they had sixty or seventy cases in the ships; and referring to a hospital in Essex which he believed spread smallpox in the neighbourhood, he mentions that this did not happen until there were 200 patients, adding pointedly that he could not tell why disease did not come from the hospital at first when the number of patients was small. I venture to offer an obvious reason. Whatever is the organism that transmits the virus, the further it travels the more it is diffused. If a person goes into a room or comes within a few yards of where there are five or six patients, he is exposed to it in what I may call a concentrated form; but if he is never nearer than fifty yards from the place, the infecting power is so reduced by dissemination that unless he is peculiarly susceptible he is quite safe. If instead of two or three patients there were 100 or 200, there would probably be some risk. The volume of the virus would be immensely increased; and although I would still believe that it could do no mischief at the distance of a quarter of a mile, I should like to have a clear space of 80 or 100 yards. Although I offer this theory, I attach but little value to it. I have to deal with facts, and I am satisfied by the evidence to which I have referred, as well as by that relating to Birkenhead, Wolverhampton,

ton, and Ossett, that a smallpox hospital sufficient for the needs of the defendants' district may be erected and maintained on the proposed site without endangering the health of the locality. On the contrary I am of opinion that the provision thus made for isolating the disease will confer a benefit on the entire township, in which Mrs. Bowell's tenants and neighbours will share.

It would indeed be unfortunate if unsubstantial objections were to prevent the establishment of hospitals of this kind. The law in Ireland requires them to be either within the sanitary district or contiguous to it; but in townships like Rathmines and Pembroke no site more suitable than the lands of Vergemount, answering to this description, is obtainable at a reasonable price. It would, no doubt, be possible for the defendants to obtain compulsory power of purchase, and, in the words of Dr. Thresh, to "depopulate" an area of sixty or eighty acres, but such a project is beyond the means of a comparatively small and heavily rated district. At all events, in this case there are no grounds for interfering with what is proposed by the defendants. I have not thought it necessary to analyse the authorities referred to during the argument, although I have carefully considered them. The difficulty is not in ascertaining the law, but in applying the law to a particular state of facts, and this is not a matter in which much assistance can be gained from the result of other actions.

Solicitor for the plaintiff: *M. C. O'Meara.*

Solicitors for the defendants: *D. & T. Fitzgerald.*

G. Y. D.

Appeal.
1904.

ATTY.-GEN.

RATHMINES
& PEMBROKE
JOINT
HOSPITAL
BOARD.

Holmes, L.J.

Barton, J.
1904.

Jan. 26, 27.

IN RE CULLEN AND RIAL'S CONTRACT.

(1904. No. 63.)

*Lease--Covenant not to use or follow the trade or business of a publican--
Licensed spirit grocer.*

A covenant by the lessee in a lease not to use or follow the trade or business of a publican is not broken by his trading as a licensed spirit grocer on the premises.

SUMMONS under the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78).

By agreement dated the 25th November, 1903, Joseph Rial agreed to buy from John Cullen premises in Florence-street, South Circular-road, Dublin, held under a lease dated the 22nd January, 1896, for ninety-nine years, at the yearly rent of £40, and in which the vendor carried on a spirit grocery and provision business.

On the investigation of the title it appeared that the premises were held under a superior lease, dated the 30th May, 1867, for 147 years, at the yearly rent of £6 10s. That lease contained a covenant by the lessee that he, his executors, administrators, or assigns, or any person claiming or deriving by or under him, them, either or any of them, would not at any time thereafter during the continuance of the term slaughter cattle or sheep upon or erect a slaughter-house, or use or follow the trade or business of a publican, butcher, or other noisy trade, &c. The lease reserved an increased rent of £100 in case of breach of the covenant, and gave powers of distress and re-entry on non-payment of the same.

The purchaser objected to the title, so far as the restrictive covenant might prevent his carrying on the business of a licensed spirit grocer, and required a waiver of the covenant in that respect. The vendor declined to obtain such waiver, and alleged that the covenant did not prohibit the trade of spirit grocer. The purchaser

accordingly took out this summons for a declaration that his objections had not been sufficiently answered, and that a good title had not been shown.

Barton, J.
1904.
In re
CULLEN AND
RIAL'S
CONTRACT.

M'Loone, in support of the application :—

The covenant here is not against the user of the premises as a public-house, but not to use or follow the trade or business of a publican, and that business includes the sale of spirits for consumption off the licensed premises. In Webster's Dictionary (1886) the word "publican," in its modern acceptation, is defined: "The keeper of an inn or public house; one licensed to retail beer, spirits, or wine." The covenant must be construed with reference to the meaning of the words at the date of the lease: see Williamson's Law of Licensing, p. 205, referring to *Jones v. Bone* (1); and distinctions since drawn by Judges between a publican and spirit grocer cannot affect the case. The covenant is broken by selling for consumption off the premises: *Wells v. Attenborough* (2)—a case on the word "vintner," a convertible term with publican; *London and Suburban Land and Building Company v. Field* (3); *Nicoll v. Fenning* (4). *Rex (Collins) v. Justices of Donegal* (5) was a decision only on the provisions of the statute in question. The definition of spirit grocer in sect. 81 of the Licensing Act, 1872 (35 & 36 Vict. c. 94), is merely for the purposes of the succeeding provisions of that Act. This is not like *Richardson v. Murphy* (6), an action by a landlord against a tenant to restrain the breach of a restrictive covenant or condition. The plaintiff in such a case would succeed if the Court came to the conclusion that there was a breach of the covenant. In the present case the question is whether the title is to be forced on the purchaser, the head landlord being in no way bound by the proceedings, and the vendor must not only show to the satisfaction of the Court that the carrying on of a spirit grocer's business is not a breach of the covenant, but must satisfy the Court that no other tribunal would take a different view in case at any time the lessor in the lease of 1867, or his successors, proceeded on the covenant.

(1) L. R. 9 Eq. 674.

(2) 24 L. T. (N. S.) 312.

(3) 16 Ch. D. 645.

(4) 19 Ch. D. 258.

(5) 36 I. L. T. R. 229.

(6) [1899] 1 I. R. 248.

Barton, J.
1904.

In re
CULLEN AND
RIAL'S
CONTRACT.

James O'Connor, for the vendor:—

A publican is a person who keeps a public-house, and there is the greatest difference between a public-house, where drink is consumed—with the frequent accompaniments of noise and disturbance—and the establishment of a spirit grocer, who can sell only for consumption off the premises, and whose business, except in respect of quantity, resembles that of a wine or spirit merchant. A landlord might well object to the former on his property, and not to the latter. As to the distinctions between the publican and the spirit grocer, and the nature of their respective licenses, see the judgment of Holmes, J., in *The Queen (Lambe) v. Justices of Armagh* (1), and of Walker, L.J., in *Reg. (M'Kenney) v. Justices of Antrim* (2). Prior to 1872 there was no restriction on obtaining a spirit grocer's license, and even up to the Beer Retailers' and Spirit Grocers' Retail Licenses (Ireland) Act, 1900 (63 & 64 Viet. c. 30), the magistrates could not, in the absence of objection by the police, refuse a certificate: *M'Kenney's Case* (2). See further the judgments of Madden, J., and Sir P. O'Brien, L.C.J., in *The Queen (Marshall) v. Justices of Tyrone* (3). It is said that the distinction between these two kinds of license did not exist at the date of the lease. That is not so. The words "publican" and "public-house" were used in statutes prior to the date of the lease in question, and as far back as 1825. Thus in 6 Geo. 4, c. 81, s. 16 (marginal note), the word "Publican" is found, and by sect. 46 of the Refreshment Houses (Ireland) Act, 1860 (23 & 24 Viet c. 107), and sect. 31 of the Beerhouse Act, 1830 (11 Geo. 4 & 1 Wm. 4, c. 64) (English), a covenant against user as a "public-house" is to be construed to extend to "on" wine and "on" beer licenses respectively. The publican's license had its origin in the Justices' license, which existed before 1833, "to keep a common inn, alehouse, or victualling house." This license still exists in England, though in Ireland a Justices' certificate to sell beer or spirits to be consumed on the premises is substituted for it (3 & 4 Wm. 4, c. 68, sects. 2-5). It is the essence of the old victualling house license and of the publican's license that now

(1) [1897] 2 I. R. 57, at p. 63. (2) [1901] 2 I. R. 133, at pp. 171, 172.

(3) [1894] 2 I. R. 246, at pp. 254, 275.

replaces it to sell for consumption on the premises. *Pease v. Barton, J. Coats* (1) is an express authority on the question here, as is also *Holt v. Collyer* (2). See also the concluding paragraph of the judgment of Fry, J., in the latter case, p. 722. See further the Inland Revenue Act, 1880 (43 & 44 Vict. c. 20), sect. 43 (4), which contains the words "used as an ordinary public-house for the sale and consumption therein of liquors."

In re
CULLEN AND
RIAL'S
CONTRACT.

M^r Loone, in reply :—

The Irish cases cited were cases of applications for licenses or certificates, and are not authorities on the question here.

BARTON, J. :—

Jan. 27.

The short question for decision is whether the carrying on of a spirit grocery business constitutes a breach of a covenant by a lessee "not to use or follow the trade or business of a publican." The question must, in my opinion, be answered in the negative.

In Ireland the trade of a spirit grocer was created by a statute of the Irish Parliament more than a century ago. Ever since that time the difference between the trade of a spirit grocer and the trade of a publican has been well marked and has been frequently noticed by the Courts—*e.g.* by Holmes, J., in *The Queen (Lambe) v. Justices of Armagh* (3), by Walker, L.J., in *Reg. (M^r Kenney) v. Justices of Antrim* (4), and by Gibson, J., in *Rex (Collins) v. Justices of Donegal* (5). The Irish public-house is a development of the old English inn or alehouse; and although the publican's license authorises him to sell liquor for consumption "off," as well as for consumption "on," his premises, it has always been an essential characteristic of the publican's trade or business that he keeps a "house of entertainment," where his customers can and do partake on the spot of the refreshment which they require. It was this characteristic which, from early times, necessitated stringent restrictions as to the granting and renewal of publicans' licenses, and

(1) L. R. 2 Eq. 688.

(4) [1901] 2 I. R. 133, at p. 171.

(2) 16 Ch. D. 718.

(5) 36 I. L. T. R. 229, at p. 230.

(3) [1897] 2 I. R. 57, at p. 70.

Barton, J. severe disciplinary enactments as to the regulation and control of
 1904. a publican's trade. On the other hand, the spirit grocer's establish-
In re ment is not, and never has been, a "house of entertainment."
 CULLEN AND He is a shopkeeper with no authority to sell liquor for consump-
 RIAL'S tion "on" the premises; and his authority to sell liquor for con-
 CONTRACT. sumption off the premises is limited to small quantities of spirits,
 not exceeding two quarts. The difference between the two trades
 was even more marked in 1867, when the deed containing this
 covenant was executed, than at the present day. For more than
 eighty years, from 1791 to 1872, the spirit grocer's right to obtain
 a license was not subject to any statutory restriction, and the
 disciplinary provisions applicable to his trade were comparatively
 trivial. The Licensing Act of 1872 introduced certain changes in
 these respects affecting the spirit grocer's license and trade. But
 I am of opinion that there was, in 1867, and is at the present
 time, a clear difference of meaning attaching to the words
 "publican" and "spirit grocer," respectively, and that the risk
 of noise, disturbance, and other inconvenience entailed by a
 business involving the consumption of drink "on" the premises,
 was the risk aimed at by this restrictive covenant. This view
 finds support from the words which follow, "or other noisy trade."
 There is a very apposite passage in the judgment of the Lord
 Chief Justice in *The Queen (Marshall) v. Justices of Tyrone* (1),
 which expresses what, I think, was in the contemplation of the
 parties to this covenant. At page 275 the Lord Chief Justice
 said:—"A public-house, with its consumption of spirituous liquors
 on the spot, may be offensive to its surroundings, whereas a spirit
 grocer's establishment, licensed to sell spirits for consumption off
 the premises, is not at all equally likely to be attended with the
 elements of disturbance, noise, and offensiveness which sometimes
 attend public-houses." The English cases do not afford much
 direct assistance, because the spirit grocer is the creation of Irish
 legislation. But the English decisions, some of which turn on the
 meaning of such words as "beer-house," or "beer-shop," when
 found in close juxtaposition to the word public-house in a
 restrictive covenant, seem to be quite consistent with the view of

this covenant that has occurred to me. A good example is afforded in the concluding words of the judgment of Fry, J., in *Holt v. Collyer* (1).

For these reasons I am of opinion that the carrying on of a spirit grocery business does not constitute a breach of the restrictive covenant in the present case, and that the purchaser's application upon this summons must be refused.

Solicitor for the purchaser : *Patrick J. Brady.*

Solicitors for the vendor : *Magee & Lahiff.*

D. M'C. M.

Barton, J.
1904.
In re
CULLEN AND
RIAL'S
CONTRACT.

GIBBINGS *v.* HUNGERFORD AND THE LORD MAYOR
AND BURGESSES OF THE CITY OF CORK (2).

Appeal.
1901.

Nov. 20–22.

Nuisance—Sewage—Sewer—Sanitary Authority—Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52), s. 274—Parties—Injunction—Costs.

1902.

Jan. 21, 22,
29.

By permission of the plaintiff the Corporation of Cork had for many years discharged surface water from a public road, through a drain belonging to the Corporation, into a pond on the plaintiff's land. Subsequently, as the drain became offensive, it was, at the plaintiff's request, diverted into a cesspool made by the Corporation on his land. By direction of the Corporation the defendant H. connected some newly-built houses belonging to him with the drain, and the sewage from these houses was accordingly discharged into the plaintiff's lands through the drain. The plaintiff had given no permission to the defendants to discharge this sewage on his premises :—

Held (affirming the judgment of the Vice-Chancellor), that the plaintiff was entitled to an injunction against the Corporation and the defendant H., restraining them from discharging sewage on his lands, and to a mandatory injunction to disconnect the said houses from the said drain, but that the Corporation should pay the costs both of the plaintiff and of H.

APPEAL from an order of the Right Hon. the Vice-Chancellor of Ireland, made the 30th July, 1901, perpetually restraining the defendants from discharging, or causing or permitting to be discharged, from the lands and premises of the defendant W. T.

(1) 16 Ch. D. 718, at p. 722.

(2) Before LORD ASHBOURNE, C., and FITZ GIBBON and HOLMES, L.JJ.

Appeal. Hungerford, sewage or water polluted by sewage into or upon
 1901. the plaintiff's lands, and from discharging, or causing or per-
 GIBBINGS mitting to be discharged, from the lands and premises of the de-
 v. fendant W. T. Hungerford, sewage or water polluted by sewage
 HUNGERFORD into or through the channel or drain running along the centre
 of the Montenotte-road, and thence into or upon the plaintiff's
 lands and premises, and from connecting, or causing or permit-
 ting to be or remain connected with the said channel or drain any
 sewer or drain for the discharge from the lands of the defendant
 W. T. Hungerford, of sewage or water polluted by sewage, and
 directing the defendants forthwith to remove every such connec-
 tion for the discharge from the lands and premises of the defen-
 dant W. T. Hungerford, of sewage or water polluted by sewage
 into the channel or drain running along the centre of the Mon-
 tenotte-road, and directing the defendant W. T. Hungerford to
 pay to the plaintiff the costs of two orders made in this action,
 dated, respectively, the 9th July, 1900, and the 10th December,
 1900, and directing the defendants to pay to the plaintiff all his
 other costs incurred in the action.

The action was originally instituted against the defendant Hungerford alone, the writ being indorsed with a prayer for an injunction restraining him from doing the acts which the order appealed from restrained both defendants from doing, and for a mandatory injunction to the same effect as that granted by the order. On July 9, 1900, the Vice-Chancellor granted an interlocutory injunction restraining Hungerford from doing the acts complained of. Hungerford appealed from this interlocutory order, but the Court of Appeal dismissed the appeal, suggesting that the Cork Corporation should be joined as defendants. Liberty to join the Cork Corporation as defendants and to amend the writ of summons was given by the order of the 10th December, 1900.

The plaintiff was the owner of property consisting of private dwelling-houses, with gardens and pleasure grounds attached, in one of which houses he resided, situate on the south side of the Montenotte-road, a residential suburb of the city of Cork. This suburb lies on a strip of ground steeply sloping from north to south, while the Montenotte-road runs from west to east. On the road

there is a slight fall from opposite directions, the lowest point being just above the plaintiff's property, so that the surface water flowing from these opposite directions meets just above the plaintiff's ground. A channel or drain runs along the centre of the road constructed to convey surface water only, and there being originally no outlet to this drain, any water running therein made its escape by percolation only through the adjoining soil, or by overflowing at the lowest point of the road.

Some forty or fifty years previous to this action the father of the plaintiff (then the owner of the property), at the request of the city surveyor, and on a representation by him that the channel or drain conveyed surface water only, permitted the Corporation of Cork to connect the channel or drain with a pond formed by surface water in the grounds attached to the house on which the plaintiff now resided. Some time after this connection was made the drain became offensive, and the pond used in wet weather to overflow, and on complaint being made to the Corporation by the plaintiff's father, that the overflow was caused by the surface water coming from the road, the Corporation, in order to induce the owner not to withdraw the license given by him for bringing the surface water into his property, and by his permission, dug a large pit on his lands and connected the channel or drain with the pit, causing the surface water from the road to flow into the pit instead of into the pond. The offensive condition of the drain was, in fact, caused by sewage matter being discharged into it from some houses, one of which was called Rosemount. But it was not proved that the plaintiff's father knew this.

In the year 1889 the Corporation extended the drain running along the Montenotte-road, both east and west, merely lengthening it in both directions. In 1894 the defendant Hungerford procured the Corporation to connect the drainage of some of his houses, which lay on the north side of the Montenotte-road above the plaintiff's lands, with the channel or drain in the centre of the road. This drainage had previously flowed into a cesspool on Hungerford's own property, but the change so made turned it into the pit on the plaintiff's lands. Five years later Hungerford converted some stables on his property into artisans' and labourers' dwellings, and he and the Corporation connected the drainage of these

Appeal.
1901.

GIBBINGS
v.
HUNGERFORD

Appeal.
1901.

GIBBINGS
v.

HUNGERFORD

dwellings with the channel or drain, and thus turned the sewage from them also into the pit on the plaintiff's ground.

Prior to the date of these connections being made, all the houses on each side of the road were always drained into cesspools of their own, there being no public system of main drainage for the neighbourhood.

As the result of thus connecting Hungerford's houses with the pit on the plaintiff's ground through the channel or drain on the Montenotte-road, the pit overflowed, and the plaintiff's grounds were covered with sewage matter in the most offensive manner. Having failed to obtain redress by complaint to the defendant Hungerford, the plaintiff instituted this action, and applied for and obtained the interlocutory injunction above mentioned. Hungerford complied with this injunction, and had his houses disconnected with the drain on Montenotte-road.

The plaintiff's statement of claim was delivered after the proceedings had been amended by adding the Corporation as defendants. It set out the several matters above stated, and concluded with a prayer for relief, which was practically granted by the terms of the Vice-Chancellor's order.

Hungerford delivered a defence alleging that the channel or drain on Montenotte-road was a sewer within the meaning of the Public Health (Ireland) Act, 1878, vested in the Corporation as Sanitary Authority of the district, that his houses were connected therewith by the direction and with the sanction of the Corporation, and that the acts complained of were done by the direction and with the sanction of the Corporation as such Sanitary Authority.

The Corporation pleaded that they did the acts complained of by leave and license of the plaintiff, setting out various matters in support of this plea, which, however, the Court on the evidence held was not sustained: the evidence only showing license to discharge innocuous water on the plaintiff's lands, at first, and afterwards only such impurities as could be rendered innocuous by reception into the pit above mentioned, but at no time authorising the defendants to create a nuisance on the plaintiff's lands. The two defences on which the Corporation in the main relied were thus stated by them in the 10th and 12th paragraphs of their defence.

10. The said defendants further say that they are a Sanitary Authority incorporated by the statute The Cork Improvement Act, 1852, and all sewers within the said Borough are vested in them by the said Act, and the Public Health (Ireland) Act, 1878 ; and the said defendants say that under the provisions of the said statutes the Corporation of the said Borough were, at the time of the happening of the events and the doing of the acts in this action complained of, bound to make such sewers as might be necessary for effectually draining the said Borough for the purposes of the Public Health (Ireland) Act, and the said defendants say that the acts in the statement of claim complained of and alleged to have been done by them, the said defendants, were done by them as such Sanitary Authority acting in pursuance and by virtue of the said Acts ; and the said acts were done and the said works were so executed by the said defendants with all reasonable care and skill, and said defendants will submit that by reason of the matters in this paragraph stated this action cannot be sustained.

Appeal.
1901.

GIBBINGS
v.
HUNGERFORD

12. As a further defence the said defendants, for the purpose of brevity and to avoid prolixity, repeat paragraph ten hereof, and they submit that plaintiff's claim for relief, if any, against them should be made under section 274 of the Public Health (Ireland) Act, 1878.

At the trial the several above stated matters were proved, and evidence was also given of other houses having been connected with the drain on Montenotte-road in recent years. The evidence also showed that the nuisance complained of by the plaintiff began from almost imperceptible beginnings, and grew to the dimensions existing at the time the action was brought (when it was admitted to be most noxious and injurious), according as the number of houses connected with this drain increased.

The Vice-Chancellor held the nuisance fully proved, decided that the channel or drain on Montenotte-road was not a public sewer, that the plaintiff had never given leave to the defendants to create a nuisance on his land, that the wrong complained of by the plaintiff was not a wrong resulting from a failure to exercise or not properly exercising the statutory powers given to the Corporation, but from acts of commission for which they were

Appeal. liable at Common Law, and, therefore, he granted the injunction
1901. as stated in the order appealed from.

GIBBINGS
v.
HUNGERFORD

Matheson, K.C., and Patrick J. Lynch, for the Corporation.

O'Connor, K.C., and George Green, for Hungerford.

The Solicitor-General (Campbell, K.C.), and Matthew J. Bourke, K.C. (with them D. M'C. Mahony), for the plaintiff.

1902.
Jan. 29.

LORD ASHBOURNE, C. :—

The cause of action in this case was trespass alleged to have been committed by discharging sewage upon the plaintiff's lands, and the relief prayed was an injunction against continuing the nuisance, and damages. Separate defences were put in by the two defendants. The defence of the Cork Corporation raised three grounds of defence—(1) That they were the Sanitary Authority acting in pursuance of the Public Health Acts, and that the acts complained of were done by them as such Authority acting in pursuance of the said Acts with all reasonable care and skill; (2) that the acts complained of were done by and with the plaintiff's leave and license; and (3) that no remedy was open to the plaintiff against them except under the Act of Parliament, viz. section 274 of the Public Health (Ireland) Act, 1878, by going before the Local Government Board to compel them to construct a proper system of sewage; and that the statute having pointed out a particular remedy, no other remedy was open. Hungerford's defence was totally different. It alleges that the Corporation alone was liable for the acts complained of, as Hungerford was acting under their authority, and had no authority over the public sewer with which he was connected, and could not control its discharge or place of output.

The facts are extremely clear. The nuisance complained of is abundantly proved. Offensive sewage matter was discharged on the plaintiff's pleasure ground to the detriment not only of the enjoyment of his residence, but of the health of his family. No member of the Court has a doubt that the plaintiff has a right to the relief which he seeks against the nuisance and trespass to which he has been subjected.

I am clearly of opinion that all the defences of the Cork Corporation entirely fail. It is true that they are the Sanitary Authority with the public sewers vested in them; and assuming that the Montenotte sewer and the pipe running from it were both public sewers, that affords no vestige of justification to them to discharge a mass of offensive matter on the plaintiff's lands. The Corporation's plea of leave and license equally fails. It is true that the plaintiff and his father sanctioned the use of the pipe for surface water, and also for some sewage—the pipe being prolonged for that purpose; but when Hungerford's new houses were connected with the sewer, no sanction was given to the great increase of sewage then discharged, and the nuisance thereby created. The third defence raised by the Corporation relying upon the Public Health Acts entirely misconceives the scope and object of those Acts. A clear remedy exists against a Sanitary Authority for omission to perform a statutory duty. But the plaintiff complains of no matter of omission, but of active trespass by casting offensive matters on his grounds. This third special statutory ground of defence, in my opinion, entirely fails.

Hungerford's position is totally different. His main defence is that he has no personal liability, having only obeyed the mandates of the Corporation, and that he had really no power to control their actions. This has always been his contention, urged with steady insistence. There is no discordant note in the tone that he has adopted throughout. At the first institution of this suit Hungerford was made a sole defendant, and he had to submit to an injunction against the continuance of the nuisance. This injunction was granted by the Vice-Chancellor upon an interlocutory application, and was affirmed by an order of this Court. Hungerford acquiesced in this interlocutory injunction, and disconnected his houses with the main pipe. But on the former hearing in this Court, the Master of the Rolls and Lord Justice Fitz Gibbon intimated that it was not possible to give complete relief, or to give effect to a broad and masterful view of the entire case in the absence of the Cork Corporation; and they have accordingly been added as defendants. When the case came on for trial before the Vice-Chancellor, he gave an injunction against both parties, and both parties have thought proper to appeal.

Appeal.
1902.
GIBBINGS
v.
HUNGERFORD
Lord
Ashbourne, C.

Appeal.
1902.—
GIBBINGS
v.
HUNGERFORD
Lord
Ashbourne, C.

In my opinion the Cork Corporation have no defence, and I think that the injunction is rightly granted against both parties. The position of Hungerford is special, and requires to be noted. I think that if the action had been brought against the Cork Corporation alone in the first instance, it could have been maintained; but having been brought against Hungerford at the inception of the proceedings, and an injunction and costs having been awarded against him in this Court, and having regard to some of the evidence, I think he is legitimately before us, and can be bound by the injunction. But I regard the whole real liability as that of the Cork Corporation. They should have at once recognised that they solely were liable to meet the burden of the plaintiff's case. I do not find a document that indicates that they realised their responsibility. Still, they have gained the advantage from this case of learning their clear liability in respect of this sewage. They know now the limits and grounds of their liability; and they also have gained the advantage of obtaining from the plaintiff an undertaking—which will appear on the files of the Court—to permit a necessary connection through his lands. Lord Justice Fitz Gibbon will state the precise terms of our order, which frames an easy method by which the difficulties can be met.

I have nothing to add except on the matter of costs. The Corporation must pay the costs, including the costs of Hungerford, both here and in the Court below.

FITZ GIBBON, L.J. :—

The cause of action is trespass by discharging sewage upon the plaintiff's land in such quantity as to cause a nuisance. The relief prayed is an injunction to restrain the defendants and their agents from continuing the nuisance, and damages. This relief has been granted by the order appealed from, except damages, which were waived. The nuisance is abundantly proved, and is aggravated by its serious effect upon the health and comfort of the plaintiff and his family. We are all satisfied that a legal wrong has been inflicted upon the plaintiff, and the only question remaining to be determined is whether either or both of the defendants should be held answerable, first for the injury, and secondly for the costs.

The course of the litigation has been complicated in conse-

quence of the action having been commenced, and continued up to the affirmance by this Court of the interlocutory injunction, against the defendant Hungerford alone.

Appeal.
1902.

GIBBINGS
v.

HUNGERFORD

Fitz Gibbon,
L.J.

Having regard to the facts as they appeared on the hearing of the former appeal, and as they have since been developed in evidence, it is plain that the rights and liabilities of the parties could not have been satisfactorily ascertained or adjusted without making the sanitary authority a defendant. Even with the explanation offered at the Bar here, it is difficult to see why the Corporation was not originally sued, but to understand that explanation we must look to the circumstances as known to the plaintiff when the writ issued. The drain from which the offensive matter was discharged had existed for many years. Though at first constructed to receive the surface water of the Montenotte Road only, and continued by permission of the plaintiff's father into his ground only for the purpose of carrying away that water, it was afterwards extended, at each end, under the road by the sanitary authority, and was used to receive the sewage from at least one house, Rosemount, and apparently also from some other houses. The extent to which it was so used is not quite clear, and the bad construction of the sewer prevented a good deal of its contents from running down upon the plaintiff. But the use of the pipe as a sewer was so far known to the late Mr. Gibbings that he became aware that something in the nature of a nuisance was thereby caused at the exit from the pipe on his land. This annoyance was, at his suggestion, remedied for the time by extending the pipe and substituting a cesspool for the pond which had previously received the surface water.

But until the sewage from the defendant Hungerford's new houses was delivered into the pipe, no serious nuisance was experienced by the plaintiff. The immediate consequence of adding Hungerford's sewage to the quantity previously delivered into the cesspool was that it overflowed, the plaintiff's garden was flooded by offensive matter, and a serious nuisance at once arose. Before any harm was done, the plaintiff swears that he spoke to Hungerford, and was assured that surface water only was intended to be sent down. When the annoyance began, the plaintiff complained,

Appeal.
1902.
GIBBINGS
v.
HUNGERFORD
Fitz Gibbon,
L.J.

and called upon Hungerford to discontinue the discharge of sewage into the drain. He was met by an assertion of right, and by a reference to the city engineer. The mischief was the direct consequence of Hungerford's acts, those acts were persisted in under a claim of right, and though the plaintiff's allegation that the action was commenced in ignorance that the Corporation was concerned in the matter cannot be fully accepted, there is no reason to believe that the details or the extent of the active co-operation of the Corporation in creating the nuisance were known to the plaintiff or to his advisers until after the hearing of the interlocutory appeal. In consequence of the expression of the opinion of this Court that the litigation could not be satisfactorily carried on unless the Corporation was joined, inquiries were made by the plaintiff, and the Corporation was made a defendant. The Corporation filed a defence disputing liability, and relying upon three points—1st. That the drain under the Montenotte Road and the pipe upon the plaintiff's land were "sewers necessary for effectually draining the Borough for the purposes and within the meaning of the Public Health Acts" vested in the Corporation, and that the acts complained of were done by "the sanitary authority acting in pursuance and by virtue of the said Acts with all reasonable care and skill": wherefore it was submitted that the action could not be sustained against it. 2nd. Leave and license, and acquiescence, were pleaded in bar of the action. 3rd. It was pleaded, as matter of law, that no remedy lay against the sanitary authority, except relief under the Public Health Act, 1878, s. 274, *i.e.* relief by going before the Local Government Board to compel the Corporation to construct an efficient system of sewage.

While thus submitting that the action could not be sustained in law or fact, and that it should be dismissed with costs, the Corporation in pleading nowhere suggested any offer or even willingness to mitigate or remove the cause of complaint. The defence was a justification and a denial of liability.

Taking these three defences in inverse order, none of them is sustainable.

The remedy under the Public Health Act, 1878, sect. 274, is a remedy against a sanitary authority for neglect to provide the sufficient system of sewage which it is its duty to construct

for the benefit of the inhabitants. It is a remedy for the non-performance of a statutory duty. The plaintiff wanted no sewage system for himself; his cause of action was not the want of sufficient sewers; it was an active trespass by flooding his land with offensive sewage matter. Better sewers could not compensate him for what he had suffered, nor stay the nuisance during their construction. His vested cause of action for trespass, and his right to restrain it, could not be satisfied by going to the Local Government Board, and the principle upon which a public body can be forced to perform its duty only by pursuing a prescribed statutory process of enforcing such performance has no application to an action brought for an injunction and damages in respect of an active wrong.

The second defence, leave and license, equally fails. Mr. Gibbings gave no leave to create a nuisance. He first gave leave to put the pipe upon his land for an innocuous purpose. Afterwards, when some annoyance was caused, he gave further leave to extend the drain, and to make a cesspool to get rid, more or less effectually, of that annoyance. His present cause of action is the nuisance caused by an unauthorised, unlawful, and injurious addition to the burden which he had voluntarily accepted, and there is no evidence that he licensed or acquiesced in the discharge upon his land of the sewage from Hungerford's new houses which did the mischief.

The first defence of the Corporation is established to a certain extent, but only to an extent which does not meet the action, upon Mr. Gibbings' letter of March 4, 1895, with the other evidence. I assume, without so deciding, that, when the drain was extended and the cesspool was constructed, the whole drain, both under the Montenotte Road and upon the plaintiff's land, down to and including the cesspool, was so used as to become a "sewer" within the definition in the Public Health Acts. At all events the drain under the Montenotte Road was a "sewer" within the meaning of the Acts. But this can afford no defence to the Corporation, for the cause of action against it is having used the sewer unlawfully, by allowing the offensive matter to come down into it which did the injury. The authorities are as clear as are the Common Law and the requirements of justice, that a sanitary authority cannot

Appeal.
1902.

GIBBINGS
v.
HUNGERFORD
Fitz Gibbon,
L.J.

Appeal.
1902.
GIBBINGS
v.
HUNGERFORD
Fitz Gibbon,
L.J.

lawfully use even a complete system of sewage so as to create a nuisance beyond its limits ; nor can it lawfully deal with a sewer which has no outfall as if it was a complete "sewer," when the consequence is an offensive outburst upon private property.

The Corporation is liable to the plaintiff, and he is entitled as against it to the full measure of relief sought. He is entitled to an immediate and perpetual injunction to stop the use of the existing sewer so as to damage him ; and it is for the sanitary authority to prevent the recurrence of the injury. This may be done in whatever lawful way the Corporation thinks best, but it is admitted by all parties, it is proved by the maps and other evidence, and I may add that it is obvious to every one who knows the place, that an easy way exists of setting things right by continuing the existing sewer down into the system connected with the river. Our order will facilitate the Corporation in the performance of its duty by putting the plaintiff under terms (which were in effect offered by the draft consent tendered during the hearing) to permit a proper sewer to be constructed and maintained through his premises, which shall be available to serve the plaintiff's houses as well as any others which the sanitary authority may require to be connected with it.

As against the Corporation, the plaintiff's right to the full relief prayed, with all costs properly and necessarily incurred by him in suing that body, appears to me to be unquestionable, and the appeal of the Corporation must be dismissed with costs.

The case of the defendant Hungerford, so far as he relies upon the action of the sanitary authority as a justification for him, rests on different considerations, and appears to me to depend upon the question whether his acts were or were not lawful acts. If not, the action lies against him. If his acts were lawful, no judgment can be given against him, for costs or otherwise.

In my opinion Hungerford was both a necessary and a proper defendant : immediate or complete relief could not be given to the plaintiff without binding him, and I do not know any principle of law, nor can I find any statute, by which the unlawful act of a sanitary authority can create a *jus tertii* to injure a private person. I must hereafter refer to a number of cases which appear to me to lay down that the acts of the sanitary authority here were

unlawful, and that every person who contributes to the injurious consequences flowing from such acts is liable to an action for so doing, and is liable to an injunction. Hungerford's defence is that the discharge of his sewage upon the plaintiff's land was not his act, that he put it into the Corporation sewer, not merely lawfully, but under compulsion of the Corporation, which carried it away from him and put it on the plaintiff's land. But unless and until a proper outfall was provided, the necessary consequence (of which in this case Hungerford was warned) of putting the sewage into the Corporation sewer was that it must run down upon the plaintiff. An injunction against the Corporation could not give to the plaintiff the immediate or absolute relief to which he was entitled. If the action were dismissed against Hungerford, or if he was not included in the injunction, he must be left at liberty to continue to discharge his sewage into the sewer under the road, and thence it must force its way into the plaintiff's land, unless the Corporation stopped the outlet, and then it must burst out upon the road, or spread mischief among the other houses connected with the sewer.

The power to suspend an injunction, on considerations of convenience, must not be confounded with the right to obtain it. I shall presently refer to cases which seem to me to establish (a) that the Corporation could not, *proprio motu*, cut off Hungerford's connection; (b) that as against the plaintiff, Hungerford's use of the sewer so as to cause injury was unlawful, notwithstanding that he was acting by direction of the sanitary authority; and (c) that under such circumstances it is the right of the injured person to obtain an injunction against both or either of the parties whose acts cause the wrong—as well against the sanitary authority which directly does the mischief as also against the person who, by sending the offensive matter into the sewer, is the cause of it.

On the application for the interlocutory injunction evidence was given, and this Court decided, that, on the balance of convenience, the immediate remedy to which the plaintiff was entitled was an injunction requiring Mr. Hungerford to revert to the use of his own cesspool, and this relief could not have been given if he was not a defendant—as a matter of fact, he was then the only defendant. This shows that he was a necessary party, for without

Appeal.
1902.
GIBBINGS
v.
HUNGERFORD
Fitz Gibbon,
L.J.

Appeal. binding him this relief could not be given. But I base my
 1902. decision that he was a proper party upon the broader ground that
 GIBBINGS the plaintiff had a cause of action, and was entitled to a perpetual
 r. injunction, against him because he was the *causa sine qua non* of
 HUNGERFORD a trespass, which could not be justified under an order of the
 Fitz Gibbon, sanitary authority which was unlawful.
 L.J.

In my opinion a person who acts under the direction of another in doing an act which unlawfully injures a third person is liable to the third person. The rights and remedies of the third person are absolute; the principal and subordinate whose combined acts do the mischief must settle their liabilities *inter se* justly between themselves, but neither of them has a defence against the injured party. Suits for injunctions are frequently brought against several defendants, principals and agents. The relation between them may be unknown to the plaintiff, but whether he knows it or not, he can sue anyone who causes the wrong. Lessor and lessee was the relation in *Child v. Stenning* (1), and judgment was given against both, but the lessor, being the cause of the whole litigation, was ordered by the Court of Appeal to pay the costs of the plaintiff and of the lessee, which Fry, J., had thrown on both defendants. The result must have been the same if the act complained of had been one which the lessee had bound himself to do by covenant with the lessor.

Kirkheaton Local Board v. Ainley (2), in the Court of Appeal, appears to me to describe the positions of the Corporation and of Hungerford in apt terms. Lord Esher asks (p. 281) :—

“Did, or did not, the defendants cause the sewage which they sent from their premises to flow into the stream? It seems to me that they did: unless they had done what they did it would not have flowed into the stream; they seem to me to be the *causa causans*, or, at any rate, the *causa sine qua non*. Can the fact of their causing the sewage to flow through a sewer into the stream be said, in ordinary language or by construction of the Act of Parliament, to prevent them from being the cause of this sewage flowing into the stream? I do not think that it can. Therefore, they are offenders under the Act.”

In that case the sanitary authority, who were themselves

(1) 11 Ch. D. 82.

(2) [1892] 2 Q. B. 274.

guilty of dereliction of duty, were the plaintiffs, and were trying to prevent the defendants from sending sewage into their sewers. It was held that *they* could not obtain an order against the defendants, because they were themselves *in pari delicto*. But Lord Esher says (p. 282):—

Appeal.
1902.
GIBBINGS
v.
HUNGERFORD
Fitz Gibbon,
L.J.

“Both the defendants and plaintiffs are liable under the Act, the former for *causing*, and the latter for *knowingly permitting*, the sewage to flow into the stream. . . . The fact of a dereliction of duty on the part of the plaintiffs would not justify the defendants and take them out of the Act. The wrongful act of one person cannot excuse the wrongful act of another; *both are liable*. If, then, there were no other infirmity in the plaintiffs’ case, I think that an order in the nature of an injunction ought to be made against the defendants, under sect. 10 of the Act.”

The only ground on which the injunction there was refused was because the plaintiffs were *participes criminis*; that ground does not exist here, where the plaintiff is an innocent person. But the material point which the case decides is that the creation of a nuisance is a wrongful act on the part as well of the sanitary authority as of the persons who use its sewers so as to cause the nuisance, and that both are liable to an injured person.

That case was decided in 1892 by Lord Esher and Bowen and Smith, L.JJ.

Mr. Hungerford’s counsel chiefly relied on *Ferrand v. Hallas Land and Building Company* (1), which was decided by the same Court and by two of the same Judges in the following year. It, therefore, cannot conflict with the *Kirkheaton Case* (2). It appears to me to rest upon the provision of the Rivers Pollution Prevention Act, which gives immunity to persons acting under the sanction of the sanitary authority. This immunity is referred to in the *Kirkheaton Case* by Smith, L.J. (3). There is no such provision in the Irish Public Health Act, 1878, and consequently the *Kirkheaton Case* (2) is an express decision that both the Cork Corporation and Hungerford are “offenders,” and are “liable,” and that “an injunction ought to be made” against both of them; at suit of the plaintiff Gibbings.

(1) [1893] 2 Q. B. 135. (2) [1892] 2 Q. B. 274. (3) *Ibid.* 288.

Appeal.
1902.
GIBBINGS
v.
HUNGERFORD

If the action lies against Hungerford, it is impossible to make the plaintiff pay his costs. If it does not lie, it is equally impossible to make the Corporation pay Hungerford's costs, in ease of the plaintiff who had sued the wrong man.

Fitz Gibbon,
L.J.

One matter, however, affecting the amount of costs requires consideration. If any additional cost had been caused by not joining the Corporation at the commencement of the action, it would be right to consider whether the plaintiff's alleged ignorance of the relations between Hungerford and the Corporation was a sufficient excuse, and a special order as to these additional costs might be just.

But there were no such additional costs. The case took its ordinary course against Hungerford alone up to the affirmance of the interlocutory injunction. When the Corporation was joined the defendants severed in their defences, and incurred two sets of costs instead of one. We now have two appeals. The Corporation made no attempt to reopen or to modify what had been done in the suit, and the only effect of postponing the joinder of the Corporation has been to save the costs of a second defendant up to the affirmance of the interlocutory injunction. Therefore, there is nothing in the conduct of the suit which can make the plaintiff liable to pay any costs, or can deprive him of any costs to which he would otherwise be entitled.

But it is now proved that Hungerford acted throughout under the direction of the sanitary authority: that authority was the *dux facti*; the principle of *Child v. Stenning* (1) applies; and Hungerford's costs must be paid by the Corporation, as being the party who, in the words of Jessel, M.R., "caused the litigation."

Under the old practice the form of order in such a case was that the plaintiff should pay the costs, and have them over against the party liable, but the order in *Child v. Stenning* (1) is a precedent for making them payable by the co-defendant directly; that is manifestly a better practice, because the co-defendant who is to pay will thereby become the party to look after the taxation.

Holding, as I do, that Hungerford is liable as a defendant,

and as he relied on his own right, and did not rely merely on the action of the sanitary authority, I should have felt some difficulty in making the Corporation pay all his costs, and especially the costs of his unsuccessful appeal. The plaintiff is to get all his costs, and I do not dissent from the order which makes the Corporation pay Hungerford's costs also. At the same time, such an order—at least, as to the costs of his appeal—seems to me to be hardly consistent with the decision that the action was not maintainable against him.

Appeal.
1902.
GIBBINGS
v.
HUNGERFORD
Fitz Gibbon,
L.J.

The general importance of the question makes it my duty to refer to some of the cases which appear to me to conflict with the suggestion that the defendant Hungerford was not properly made a defendant, or that an injunction could not have been obtained against him alone. A question put during the argument, though savouring of burlesque, will illustrate my view of his position.

It was asked whether the inhabitants of one of our streets could be made defendants if the servants of the Corporation who empty the buckets left at our doors every morning were to throw the contents into the area of some neighbouring house. I answer—No: no more than one of them would be liable to damages for assault if the Corporation servant flung his bucket into the face of a passer by. But why? Because there would be no connection of cause and effect between the act and the trespass. I have already quoted the *Kirkheaton Case* (1) to show that this relation does exist where the discharge of sewage by a private person into a public sewer causes a nuisance at the outfall. But an inhabitant would be liable if, knowing that his refuse when put into the bucket would—and intending that it should—be thrown into his neighbour's area, he insisted on delivering it into the bucket for that purpose. That is Hungerford's position. He knew that the outfall from the pipe was on the plaintiff's land. He was warned that his sewage would create a nuisance there, and he persisted in sending it there, though with little expense or inconvenience he could have used his own cesspool. In this respect he was in a less meritorious position than the inhabitants of *Kirkheaton*, who were held to be joint wrong-doers with the sanitary authority.

(1) [1892] 2 Q. B. 274.

Appeal.
1902.
GIBBINGS
v.
HUNGERFORD
Fitz Gibbon,
L.J.

Other cases were cited, which bear, more or less directly, upon the present question. In 1858, in the *Attorney-General v. Council and Borough of Birmingham* (1), Sir W. Page Wood was asked to refuse an injunction, because it might inconvenience 250,000 inhabitants. He answered (p. 539) :—

“In the case of an individual seeking to have private rights protected against an infraction of the law, the question is simply whether he has those rights, and, if so, whether the Court, looking to the precedents by which it must be governed, in the exercise of its judicial discretion, can interfere to protect them.”

This Court has already decided, on the point of discretion, that the nuisance should be stopped by making Hungerford revert to his own cesspool.

Sir W. Page Wood says again (p. 541) :—

“The only question I have to consider is whether the nuisance has been created by the act of the defendants; and I cannot hesitate to say that it has.”

“It was argued that the inhabitants of Birmingham had a right to drain their houses into the Rea, and thence into the Tame” (where the nuisance arose). “But this, at least, is in evidence, that the alleged right, as exercised (assuming it to be a right), did not pollute the Tame as it does now. . . . But immediately the defendants’ sewers were opened the fish were killed in the river, and cattle would no longer drink of it; and there cause and effect are clearly pointed out. . . . The plaintiff is entitled to rather larger rights than the public.”

In 1866, in *Goldsmid v. Tunbridge Wells Improvement Commission* (2), Sir G. Turner, L.J., held that a prescriptive right to discharge sewage into a stream could be acquired only by a continuance of the discharge of the sewage prejudicially affecting the plaintiff’s estate for twenty years, and that if the fouling of the stream amounts to a nuisance at law, and if this nuisance seriously affects the estate, the Court ought to interfere to prevent it (p. 352). He could find nothing in the Acts of Parliament to authorise a sanitary authority to commit a nuisance upon property beyond the range of their jurisdiction, and I can find nothing any-

where empowering such an authority to direct other persons to cause one.

In the *Attorney-General v. Colney Hatch Lunatic Asylum* (1), in 1868, the Court of Appeal held, per Hatherley, L.C. (p. 157) :—

Appeal.
1902.

GIBBINGS
v.
HUNGERFORD
Fitz Gibbon,
L.J.

“ When the nuisance is established, all the Court has to do is to say that it must cease. The Court is bound to grant the injunction, and it is no part of the duty, either of those who make the complaint or of the Court, to find out how that order can be best obeyed.”

In the *Attorney-General v. Hackney Local Board* (2), Bacon, V.C., in giving the “speedy remedy which the law has given to a man who complains of an injury which can be best redressed by an injunction” (pp. 629, 630), says :—

“ If he were to wait for a month, the wrong of which he complains might be irreparable. The relator was bound to apply for an injunction if he thought he had not sufficient redress by bringing an action for damages. . . . The law will not countenance the proposition that a sewage authority is authorised to commit a nuisance.”

In the *Metropolitan Board of Works v. L. & N. W. Railway* (3), in 1881, the Company were sued as inhabitants, and James, L.J., said (p. 249) :—

“ It is impossible to suppose that a man who has a drain into his neighbour’s land can use that drain so as to drain another close or another house, or to pour in sewage matter limited only by the size of the particular drain.”

Cotton, L.J., held that the Company could not justify increasing the burden which their ditch threw into the stream in question.

In the *Attorney-General v. Guardians of the Poor of Dorking* (4), in 1882, the sanitary authority alone was sued, and set up the defence that the inhabitants who had caused nuisance by increasing the amount of sewage which ran out of the sewer ought to have been made defendants. Jessel, M.R., declined (p. 605) to say that the sanitary board could stop the sewer up, and thereby “cause a most frightful nuisance to the inhabitants,” but he held that the

(1) L. R. 4 Ch. App. 146.

(3) 17 Ch. D. 246.

(2) L. R. 20 Eq. 626.

(4) 20 Ch. D. 595.

Appeal.
1902.

GIBBINGS
v.

HUNGERFORD

Fitz Gibbon,
L.J.

plaintiff could bring an action and get an injunction against any person who, without a prescriptive right, sent sewage into the drain which injured him.

Cotton, L.J., held that, although the sewer was assumed to be vested in the Local Board, it was not for the sanitary authority, but for the plaintiff, to bring an action against the people who were causing the nuisance. He said that the cases were too numerous to mention in which defendants were restrained who had done something actively to turn their sewage into the stream or on to the land of the parties complaining, and that the Acts of Parliament had given the sanitary authority power to get rid of their sewage, provided they could do so without committing a nuisance; but if they could not do it without committing a nuisance, the Act of Parliament did not authorise them to do it, and they were in the same position as individuals who were doing a wrong to their neighbour without any Parliamentary authority. This decision was only a repetition of that in *Glossop v. Heston and Isleworth Local Board* (1).

In the *Acton Local Board v. Batten* (2), an injunction was refused against the sanitary authority, with an expression of doubt that it could stop drains once connected with a "sewer," because no substantial damage was proved, and Fry, J., held that there was nothing in the Act to cast upon the Local Board the burden of disposing of such sewage as the inhabitants might think fit to create by building new houses, but the case assumes the liability of inhabitants to injunction where their sewage causes a nuisance.

In the *Kinson Pottery Company v. Poole Corporation* (3), in 1899, the Queen's Bench held that the defendants, as owners, were liable for a nuisance caused by a drain which was for some purposes a sewer within the meaning of the Public Health Acts, but it was plainly intimated that those who made, or used, the drains complained of, were liable for a nuisance created by their throwing into the sewer the filth which damaged the plaintiff.

In 1899, in *Brown v. Dunstable Corporation* (4), Cozens Hardy, J., held that an injunction could not be granted so as to interfere with prescriptive rights, nor to oblige a sanitary

(1) 12 Ch. D. 102.

(2) 28 Ch. D. 283.

(3) [1899] 2 Q. B. 41.

(4) [1899] 2 Ch. 378.

authority to stop up connections sanctioned, but that an injunction must be granted to restrain the sanitary authority from authorising or directing any sewage to flow on to the plaintiff's land from sewers vested in it. The case was cited for the Corporation here, but counsel omitted to notice that it was contended that the Corporation ought to be restrained from allowing the sewage from their Town Hall to pass into the sewers, and that the only reason why that injunction was not granted was because the Corporation was sued as the sanitary authority only, and *not as owners* of the Town Hall. The Court was not satisfied that the Town Hall had not a prescriptive right, but however that might be, it was "not prepared to give a relief which was not sought by the pleadings." The learned Judge clearly intimated that if the inhabitants of the Town Hall, a single tenement in the centre of Birmingham, had been sued as such, they would have been restrained from sending their sewage into a public sewer, without a prescriptive right to do so, if a nuisance was thereby caused at the outfall, and that they could not justify under any power given to a sanitary authority by the Public Health Acts.

These cases, and the decisions of Romer, J., in the *Attorney-General v. The Clerkenwell Local Board* (1), and of Chitty, J., in *Meador v. West Cowes Local Board* (2), show that a sewer which has no proper outfall is not a sewer into which a sanitary authority can lawfully permit or direct sewage to be poured, where the inevitable result is a nuisance to a private individual, and that no person can justify pouring his sewage into such a sewer under an alleged authority which is itself unlawful.

It is my clear opinion, founded on all these cases, and on justice and common law, that the act of a sanitary authority in directing or permitting sewage to be delivered into a sewer from which it cannot be discharged without creating a nuisance, is *ab initio* unlawful: every person "causing" the nuisance by so delivering his sewage nuisance should be restrained, and is liable for the consequences to the person injured. The complete absence from the cases of any attempt to set up as a defence for such a person that he had acquired a right to do what he did, as against the

Appeal.
1902.

GIBBINGS
v.
HUNGERFORD
Fitz Gibbon,
L. J.

(1) [1891] 3 Ch. 527.

(2) [1892] 3 Ch. 18.

Appeal.
1902.

GIBBINGS
v.

HUNGERFORD

injured person (immunity under the Rivers Pollution Act only excepted), is persuasive that this is the first case in which it has ever been suggested that a *jus tertii* to cause a nuisance can be created by the unlawful act of a sanitary authority.

HOLMES, L.J.:—

Concurring, as I do, in the views of the other members of the Court as to the liability of the Cork Corporation to the plaintiff, I add nothing on this branch of the case, but as I am unable to accept some of the propositions in the judgment of FitzGibbon, L.J., I desire to add a few words as to the position of Mr. Hungerford. We are agreed that the plaintiff is entitled to judgment against the Cork Corporation, with costs of the action and of the latter's appeal. We are also, I think, agreed that the defendant Hungerford ought to be given his costs of action and appeal; but I have had some difficulty as to how this is to be carried out. It turns to a certain extent upon whether he is entitled to have the action dismissed as against him, in which case his costs ought, *prima facie*, to be borne by the plaintiff.

Montenotte-road, of which so much has been heard during the progress of the case, is within the jurisdiction of the Cork Municipal Council as the sanitary authority of the city; and in the year 1899 a sewer, as defined by the Public Health (Ireland) Act, 1878, ran along this road. The sewer had been extended some time before by the Corporation for the purpose of receiving the sewage of houses built on the north side of the road; and as a matter of fact such sewage was discharged into it through soil pipes or drains connected with it under the direction of the Corporation. In these circumstances the sewer, by virtue of the 15th section of the Act of 1878, vested in and was under the control of the sanitary authority. In 1899 the defendant Hungerford began to convert into dwelling-houses two stables that had been erected on his land to the north of the road. The 23rd sect. of the Act entitled him to cause the drains of these houses to empty into the sewer in question, subject to the conditions therein specified; and the 25th sect. enabled the sanitary authority to compel him to connect his drains with the sewer, if

he were not disposed to do so of his own accord. The contractor who was engaged on the houses was stopped in his work by the sanitary officer until he submitted a plan for this purpose; and upon its being approved of, the connection was carried out by the servants of the Corporation at the expense of Mr. Hungerford. The result was that when the buildings were completed, their sewage, pursuant to the authority and obligation of the statute, was conveyed into a sewer, the property of the sanitary authority, which thereupon and thereafter had exclusive control over it. As Lord Esher says in *Ferrand v. Hallas Land Building Co.* (1), "the moment that the sewage has gone through the drain into the sewer, the property is taken out of the landowner and is vested in the local authority, and the landowner has lost all control over it." It is for the sanitary authority to dispose of it; and ample statutory powers have been conferred for this purpose. If the sanitary authority conveys it to some place where there is no right to place it, if it is dealt with in such a way as to cause a nuisance, or if any other illegality is committed, the person aggrieved has his appropriate remedy against the body which is the wrong-doer. But I am unable to see on what principle an action would lie against the individual who, while obliged by statute to discharge the sewage into the sewer, had no control over it when it got there. The only thing done by him is to obey an Act of Parliament by sending the sewage of his houses into a public receptacle under the control of the Municipal Corporation, which is a non-tortious act that cannot be made the subject of an action. No doubt the sewage afterwards found its way into the plaintiff's lands under circumstances which gave the plaintiff a good cause of action. But against whom? I assume *prima facie* against the authority responsible for it.

In 1895 the Corporation had, by agreement with the plaintiff or his predecessor in title, arranged to convey the sewage from the Montenotte sewer to a cesspool situate on the plaintiff's property. We are of opinion that the license then given to the Corporation did not extend to such an increase of sewage as would cause a nuisance; and that the sewage was so increased

Appeal.
1902.
GIBBINGS
v.
HUNGERFORD
Holmes, L.J.

(1) [1893] 2 Q. B. 135.

Appeal.
1902.
GIBBINGS
v.
HUNGERFORD
Holmes, L.J.

when Hungerford's two houses were connected with the Montecotte sewer. In fact the sanitary authority made inadequate provision for the performance of its duties; and has no answer to an action for damages or to a claim for a mandatory injunction. The present action, however, was begun against Mr. Hungerford alone. We have been told that this was done in ignorance of the facts; and I have no reason to doubt this explanation, as I am sure that if the plaintiff's advisers knew then as much of the case as they know now, they would have named the sanitary authority the sole defendant, and that in such action they could have obtained complete relief.

In the absence of special circumstances, I am of opinion that it would be not only unnecessary but improper to name a person in the position of Mr. Hungerford defendant. It is suggested that complete relief could only be obtained by bringing him before the Court. But why should an innocent man be subject to the costs and trouble of an action for the benefit of a litigant upon whom he has inflicted no legal injury? Moreover, I am satisfied that the plaintiff could have obtained plenary relief against the Corporation alone. It has been assumed that when a mandatory injunction is given to-day, it must be fully carried out to-morrow. As a matter of fact, in the majority of cases this is impossible. It requires time to remove a building, to restore lands to their original condition, to carry out the works which a Court may order in the exercise of this jurisdiction; but the plaintiff is not damnified thereby, as he can be compensated in damages for the loss occasioned by the delay.

In the present case there could have been no objection, if the sanitary authority had been the sole defendant, to ordering it to desist from discharging sewage upon the plaintiff's lands, and to carry out forthwith the works necessary for this purpose; nor would there have been any difficulty in obeying such an order, having regard to the extensive powers with which the sanitary authority is invested. *Kirkheaton District Board v. Ainley, Sons, and Company* (1) is relied on for the purpose of showing that Hungerford as well as the Corporation was a wrong-doer; but that

case is no authority for such a proposition. It relates to proceedings under the Rivers Pollution Prevention Act, 1876, the year following the passing of the English Public Health Act. Its third section makes it an offence for any one to cause or permit sewage matter to fall or flow into a stream; and the language of the section makes it clear that a person who without the sanction of the sanitary authority conveys by means of a connecting drain through one of its sewers sewage into a stream is an offender against the Act, even although he was entitled under the Public Health Act to connect his drains with the sewer. The Legislature which confers a right can afterwards withdraw or modify it; and in one small particular the Act of 1876 limited a right given by the statute of the previous year; but this does not touch the question under consideration, and I need hardly say that cases which arose before the Public Health Act can throw no light on the provisions of that statute, one of the objects of which was by creating and imposing duties on a sanitary authority to confer benefits on householders which they did not enjoy under the previous law. In the streets of almost every city and town in the kingdom there are sewers of the sanitary authority with which the drains of the houses alongside are connected under the sanction and obligation of the Public Health Act. The householders know nothing of what becomes of the sewage. The sanitary authority has complete control over it; and may so construct the outfall of their sewer as to cause a trespass or create a nuisance. Are the hundreds of householders whom the sewer serves in its lengthened course, and whose accumulated sewage is carried by it, made trespassers or become necessary parties to an action against the real wrong-doer? I do not think so; and if there were no special features in the present case, I should be obliged to hold that the action ought to be dismissed with costs as against Mr. Hungerford. These proceedings were, however, begun under peculiar circumstances. The Vice-Chancellor believed, and I have no reason to disbelieve, the account of the interview with Mr. Hungerford in 1894, as given by the plaintiff, and I think that the natural effect of what was then said by the former was to lead to the belief that he was in a position to control the discharge from the Montenotte sewer, and that he was responsible if it created a

Appeal.
1902.

GIBBINGS
v.
HUNGERFORD
Holmes, L.J.

Appeal.
1902.
GIBBINGS
v.
HUNGERFORD
Holmes, L.J.

nuisance. He cannot therefore complain that when the action was commenced he was named defendant. Before being served with the writ he took the proper course. He at once brought it to the notice of the Corporation, which was informed by his solicitors that they would seek to make it liable for any loss which their client would be put to. It therefore became the duty of the Corporation to accept responsibility for the sewage discharged into its sewer from Mr. Hungerford's houses. This, however, it declined to do; and I doubt whether under the circumstances it would have been safe for Mr. Gibbings to discontinue the action against Hungerford when he joined the Corporation as defendants. I regard that body as the cause of the whole of the litigation; and am of opinion that whether the action be dismissed as against Hungerford or not, his costs should be borne by the Corporation upon the principle acted on by the English Court of Appeal in *Child v. Stenning* (1). I gather that counsel for Mr. Hungerford will be content with this; and as they have not pressed the Court to dismiss the action or to dissolve the injunction which has been already acted upon by their client, I am satisfied with the order announced by Fitz Gibbon, L.J., although I think that it would have been more logical to dismiss the action as against Hungerford.

Solicitor for the plaintiff: *Julian*.

Solicitors for the defendant Hungerford: *O'Keeffe & Lynch*.

Solicitor for the Cork Corporation: *F. M'Carthy*.

G. Y. D

(1) 11 Ch. D. 32.

IN THE MATTER OF THE ESTATE OF DAVID MARSHALL	<i>Meredith, J.</i>
LANG AND STEPHEN FRANK PURDAY, TRUSTEES	1903.
FOR SALE UNDER THE WILL OF ELIZABETH NOBLE	Nov. 16.
GARDE, DECEASED, A VENDOR OF LAND; AND IN THE	1904.
MATTER OF THE SETTLED LAND ACTS, 1882-	Feb. 1.
1890.	

Trustee—Appointment—Settled Land Acts, 1882, 1890—Power of the Land Commission—Redemption price of superior interest—Land Law (Ireland) Act, 1896, sect. 33 (1).

The Irish Land Commission have power to appoint trustees of the settlement for the purposes of the Settled Land Acts, 1882 and 1890, to receive the redemption price of superior interests; such appointment will, however, be limited to such purpose.

In re Dames-Longworth's Estate (26 Ir. L. T. 521) discussed.

MOTION on behalf of James Franklin Williamson that James Franklin Bland and Francis Christopher Earle Bland might be appointed trustees for the purposes of the Settled Land Acts, 1882 and 1890, of the settlement (which was also set out in the title of the matter), dated November 19, 1885, and made between Benjamin St. John Williamson of the first part, James Franklin Williamson of the second part, Emma Abbey Williamson and Alice Phillis Williamson of the third part, and Francis Christopher Earle Bland of the fourth part. Under this settlement James Franklin Williamson was tenant for life. Among the premises included in the settlement was a fee-farm rent of £25 2s. 6½d., issuing out of the lands for sale herein. The redemption price of this superior interest was by consent fixed at £625. Mr. Francis Christopher Earle Bland was the sole trustee of the deed of November 19, 1885, but he was not a trustee of the settlement for the purposes of the Settled Land Acts, 1882 and 1890; consequently it became necessary that he and a second trustee should be appointed for the purposes of those Acts, to whom the redemption money could be paid.

Meredith, J. *Leech*, for the applicant:—
1903.

In re
GARDE'S
ESTATE.
(No. 2.)

This Court has power under section 66 of the Landed Estates Court Act to appoint trustees in cases where the Lord Chancellor was empowered to do so by 13 & 14 Vict. c. 60, and 15 & 16 Vict. c. 55, "and by any other Act which may be passed in relation to trustees." This includes the Settled Land Acts, and the Trustee Act, 1893. See section 38 of the Settled Land Act, 1882, and section 47 of the Trustee Act, 1893.

In re Dames-Longworth's Estate (1), which was decided by Mr. Justice Bewley, was decided before the passing of the Act of 1896. As to the power of the Land Commission to appoint trustees for the purposes of the Settled Land Acts, see section 13 of the Purchase of Land Act, 1885; sect. 23 of the Land Law (Ireland) Act, 1887; Order XXV., Rule 1, of the Rules of March, 1897.

1904.
Feb. 1.

MEREDITH, J. :—

When this case was entered in my list a few days ago "to be mentioned," I indicated to Mr. Leech (who appeared for the applicant) that I was prepared to pay the redemption price of the fee-farm rent of £25 2s. 6½*d.* into the High Court, and then deal with the application in my capacity of "an additional Land Judge." Further reflection has, however, convinced me that it is desirable to deal with the application as it stands, in the Land Commission matter. It is obvious that if the Land Commission possess jurisdiction to appoint trustees for the purposes of the Settled Land Acts in this and similar cases, the jurisdiction ought to be exercised. The question, therefore, to be decided is, does the jurisdiction exist? Mr. Leech very properly called my attention to the decision of Bewley, J., in *Dames-Longworth's Estate* (1). That decision was, however, pronounced in the year 1892, and since then the Land Law (Ireland) Act, 1896, has become law. I refer especially to sects. 31 and 33 of that Act. [His Lordship referred to the sections.] In *Owen's Estate* (No. 3) (2), Lord Justice Walker, referring to these sections, indicates (p. 167) that in his opinion they contemplate "compulsory clearance of the purchase-money from such defined superior interests or their equi-

(1) 26 I. L. T. 521.

(2) [1900] 1 I. R. 151.

valent"; and Lord Justice Holmes in the same case (commenting on the words "redeemed or satisfied out of the purchase-money") says (p. 176):—"But whether it be redemption or satisfaction, it is to be effected by the payment of a bulk sum," and later on (p. 177) he adds—"I have not considered it necessary to examine in detail the elaborate provisions of the 31st and two following sections, which are ancillary to the direction to redeem or satisfy the value of the superior interests with which the 31st section begins; but it is impossible to read them without being struck with the great care that has been taken to provide adequate machinery for carrying out, and to remove obstacles in the way of carrying out, the cardinal object of this portion of the statute."

Meredith, J.
1904.

In re
GARDE'S
ESTATE.
(No. 2.)

These sections, and the judgments of the learned Lords Justices, make it clear, in my opinion, that since 1896, at all events, payment out of Court of the redemption price of a superior interest constitutes one of "the purposes" of a sale under the Land Purchase Acts. Apart altogether from the 23rd section of the Land Act, 1887, I hold that the provisions of section 33 (1) of the Act of 1896 apply to the present case.

The 10th section of the Act of 1885 is "an unrepealed enactment . . . relating to the distribution of the purchase-money of a holding." It incorporates with the Act of 1885 several sections of the Landed Estates Court Act, including sections 64, 65, and 66. Now, section 66 provides as follows:—[His Lordship read the section.] That certainly confers a wide and ample jurisdiction, and it appears to me clear that not merely the Trustee Act of 1893 (see sect. 47), but also the Settled Land Acts, 1882–1890, so far as they relate to trustees, are Acts "passed in relation to trustees" within the meaning of the 66th section.

Under these circumstances I grant Mr. Leech's application, but I limit the appointment to the fee-farm rent of £25 2s. 6½d., the redemption price thereof, and the trusts affecting the same.

Solicitors for the applicant: *Anderson & Bland.*

W. C. S.

Barton, J.

1904.

Feb. 16, 25.

IN RE WALDRON AND BOGUE'S CONTRACT.

(1903. No. 868.)

Vendor and purchaser—Leaseholds—Breach of covenant to repair—Liability of equitable tenant for life—Sale by trustee—Indemnity—Rescission.

As between the equitable tenant for life of leaseholds and the remainderman, the tenant for life is liable for breaches of covenant to repair committed during the existence of the life estate, and the liability for such breaches cannot be thrown by the tenant for life upon the *corpus* of the estate.

Where a trustee of leaseholds sold the premises, and the purchaser covenanted to indemnify the trustee and the tenant for life against certain judgments recovered against the tenant for life by the head landlord in respect of breaches of the covenant to repair contained in the head lease, committed by the tenant for life:—

Held, that that was a circumstance which justified a purchaser from a vendor, claiming under such an assignment, in seeking a rescission of the contract and return of his deposit.

By an indenture of lease dated 23rd February, 1815, Anne Fisher demised to James Graham, and his heirs and assigns, a certain plot of ground in Gardiner-street, in the city of Dublin, upon which the houses Nos. 46 and 47 were erected, for three lives, with a covenant for perpetual renewal, subject to the yearly rent of £41 8s. The lease contained a covenant to repair.

By a further indenture of lease dated 26th April, 1826, Anne Fisher demised a plot of ground in Lower Gardiner-street, in the city of Dublin, on which No. 48 was erected, to James Graham for a period of 999 years thence next ensuing, subject to the yearly rent of £14. Among other usual covenants the lease contained a covenant to repair.

James Graham died on the 27th December, 1847, and by his will bequeathed all his property in the city of Dublin (which included the above-mentioned plots of ground) to his grandchildren, whom he named, as tenants in common. He bequeathed the residue of his property to his daughter Mary Hildige.

By an indenture of settlement dated the 10th June, 1848, and made between George Burrowes of the first part, Margaret Anne Burrowes, by her then name of Margaret Anne Hildige, then an infant (one of the said James Graham's grandchildren), of the second part, Mary Hildige, widow, mother of the said Margaret Anne Hildige, of the third part, and William Hamilton and John Rowan of the fourth part (being a settlement executed on the marriage of the said George Burrowes and Margaret Anne Burrowes), which recited among other things the will of James Graham, the said Margaret Anne Burrowes and George Burrowes thereby covenanted with the said William Hamilton and John Rowan, in case the marriage took place, that they, together with all other necessary parties, as soon as the said Margaret Anne Burrowes, otherwise Hildige, should have attained age, should convey to the said William Hamilton and John Rowan her interest in the property to which she was entitled under the will of James Graham, upon trust to pay the yearly rents and profits to the said Margaret Anne Burrowes for her life for her separate use, with remainder to the said George Burrowes for life, should he survive her, with remainder to the issue of the marriage upon the usual trusts. The settlement contained a power of sale and of partition.

Barton, J.
1904.

In re
WALDRON &
BOGUE'S
CONTRACT.

By a deed dated 26th October, 1860, Margaret Anne Burrowes, having attained age, confirmed the said settlement.

George Burrowes died shortly afterwards, and there was only one child of the marriage.

By an order of the Master of the Rolls, James Graham Hildige and Edward Nugent were appointed trustees of the above-mentioned settlement in place of the original trustees, who refused to act. James Graham Hildige died on 4th May, 1871.

By a deed of partition dated 6th August, 1890, the premises 46, 47, and 48, Lower Gardiner-street, were among others allotted to Margaret Anne Burrowes as part of her share of the property of James Graham, and same were assigned to the said Edward Nugent to hold upon the trusts of the above-mentioned settlement.

By an indenture of the 3rd February, 1902, David M'Kelvey was appointed a trustee of the settlement in place of Edward Nugent, who had died.

Barton, J.
1904.

In re
WALDRON &
BOGUE'S
CONTRACT.

By an indenture dated 24th May, 1902, David M'Kelvey, with the consent of Margaret Anne Burrowes, assigned the premises comprised in the above-mentioned leases to William Trew for £180, in trust for Lawrence J. Waldron, the vendor in the present case. The assignment contained a covenant on the part of William Trew to expend upon the premises the sum of £300 mentioned in a judgment dated 3rd March, 1902, and made in an action in which Sir William Eden and others were plaintiffs and Margaret Anne Burrowes was defendant, and to keep said David M'Kelvey and the said Margaret Anne Burrowes and their estates and effects effectually indemnified against the same, and also against all damages, costs, and expenses incurred in an action in the King's Bench Division, in which James Moran was plaintiff and said Margaret Anne Burrowes was defendant. These judgments were recovered in respect of breaches of covenant to keep the premises comprised in the above-mentioned leases in repair.

By an indenture of 29th January, 1903, William Trew assigned to Lawrence J. Waldron, who subsequently put the premises up for auction, when No. 48, Lower Gardiner-street, was sold to Jackson De la Cour Bogue, the purchaser in the present case.

This summons was taken out by the said Jackson De la Cour Bogue to have it declared that a good title had not been shown by the vendor. The objection to the title shown was that the assignment to William Trew constituted a breach of trust.

Poole, for the purchaser :—

The conveyance on sale by the trustee was clearly a breach of trust, owing to the covenant in the assignment that the tenant for life was to be indemnified by the purchaser against the judgments recovered by the head landlord against her in respect of the breaches of the covenant to keep in repair contained in the head lease. A tenant for life of leaseholds must bear the costs of ordinary repairs accruing during the period of occupation out of his own pocket, and cannot throw the burden upon the remainderman : *Kingham v. Kingham* (1). The same principle was acted on in *In re Redding* (2), where "income" derived from leaseholds

(1) [1897] 1 I. R. 170.

(2) [1897] 1 Ch. 876.

was defined to be not the gross income, but the net income after deductions in respect of ground rent, current repairs, and other outgoings. *In Copland's Settlement* (1), sanitary expenses were thrown on the tenant for life. [He also cited *In re Fowler* (2).]

Barton, J.
1904.
In re
WALDRON &
BOGUE'S
CONTRACT.

Russell, for the vendor :—

The sale was not of the three houses, 46, 47, and 48, but of No. 48, which alone was in the possession of a solvent tenant; the other two were unoccupied and practically derelict. All the cases cited by Mr. Poole were cases where the tenant for life was in occupation. The sub-tenant of No. 48 was bound to keep the house in repair. A tenant for life is not liable to the remainderman for permissive waste : *In re Cartwright* (3) ; *In re Arbitration between Parry and Hopkin* (4). Here the legal estate was in the trustees, who were the proper persons to keep in repair. The tenant for life was not in occupation at all. The judgments recovered against the tenant for life did not affect 48, which was therefore not affected by the covenant of indemnity.

Poole, in reply :—

The cases cited by Mr. Russell have no application, as they are all cases of legal tenants for life, as contrasted with an equitable tenant for life, which is the case here. The trustee should have seen that the equities were properly adjusted between the tenant for life and remainderman. The settlement authorized a sale by public auction at the best price, but here part of the consideration was an indemnity against liabilities which should have been defrayed by the tenant for life, and which amount to a wasting of the estate.

BARTON, J. :—

This was an application on behalf of the purchaser to have it declared that his requisitions and objections to title have not been sufficiently answered, and that good title has not been shown. The premises, which are the subject-matter of the sale, consist of

Feb. 25.

(1) [1900] 1 Ch. 326.

(2) 16 Ch. D. 723.

(3) 41 Ch. D. 532.

(4) [1900] 1 Ch. 160.

Barton, J. a house in Lower Gardiner-street, held under a lease dated the
 1904. 26th April, 1826, for 999 years, subject to the yearly rent of £14.
In re The lease contained a covenant by the lessee to keep the premises
 WALDRON & in repair. The sale was by auction under conditions of sale to
 BOGUE'S which I need not refer, and the price was £490.
 CONTRACT.

Stated shortly, the objection is as follows :—The vendor derives title under an assignment to one Trew (in trust for the vendor) from a Mrs. Margaret Anne Burrowes, a tenant for life under the settlement executed upon her marriage, and from David M'Kelvey, the trustee of that settlement. It appears to be conceded that—as the result of that settlement and of a subsequent confirmation thereof, and of a certain partition deed (to which steps in the title it is not necessary for the present purpose more particularly to refer)—this house, so held under this long term of years, stood settled upon trust to pay over the rents thereof, so soon as they should become payable, to Mrs. Burrowes during her life for her separate use, and after her death and that of her husband (who has since died) in trust for the issue of the marriage. There was in the lease, as I have said, a covenant to keep the premises in repair. It appears that in 1902 an action was brought against Mrs. Burrowes by the landlord to recover damages for breach of this covenant to keep the premises in repair, and judgment was recovered against her for £300. Another action was also brought against her for breach of covenant to repair other premises comprised in her settlement which were held in fee-farm.

It was in view of this state of facts that Mrs. Burrowes and the trustee of the settlement assigned the premises to Trew, as trustee for the vendor, and the consideration for the sale was the sum of £180 in cash, together with covenants to indemnify the tenant for life and the trustee of the settlement against the judgment for £300, and against all damages, costs, and expenses in the other pending action.

The purchaser contends that this assignment constituted a breach of trust, and submits that he cannot safely accept the title unless the remainderman joins in the sale. He points out that the effect of this sale was to secure for the remainderman a sum of £180 only, and out of the *corpus* of the trust estate to indemnify the tenant for life against her liability for breach of covenant to

keep the leasehold premises in repair. The vendor, on the other hand, refuses to comply with the purchaser's requisition, and maintains that the tenant for life was entitled to be indemnified out of the trust estate for this breach of covenant to repair.

Barton, J.
1904.
In re
WALDRON &
BOGUE'S
CONTRACT.

The tenant for life and the trustee, who were the assignees in this assignment, are not represented in these proceedings, and, for all I know, they might be able to present a different view of the transaction. I have, however, to deal with the summons upon the hypothesis presented by both vendor and purchaser that this assignment involved, as part of the consideration for it, an indemnity to the tenant for life and to the trustee out of the *corpus* of the trust estate against damages, which had been incurred by the tenant for life, for breach of covenant to keep this leasehold house in repair. Several of the cases which were cited in argument have very little bearing upon the present case, in which I am not asked to consider any question as between trustee and tenant for life, or any question of permissive waste or mere breach of common law obligations, or any question of "putting into" repair as distinguished from "keeping in" repair. Again, I have not to consider a case in which the settlement or will makes provision directly or indirectly for the making of repairs. The simple question which the parties present to me is this—where leaseholds are settled upon trust for *A* for life with remainder to *B*, is the tenant for life entitled to an indemnity out of the trust estate against breaches of covenant to keep the premises in repair?

In my opinion this simple question must be answered in the negative. In such cases the obligation of performing covenants to keep in repair, as well as to pay rent, falls upon the life estate. Some doubt was cast upon this view by the interpretation which Kekewich, J., in *In re Baring* (1) and *In re Tomlinson* (2), felt reluctantly compelled to place upon the decision of the Court of Appeal in *In re Courtier* (3). In *In re Tomlinson* (2), Kekewich, J., went so far as to say that a tenant for life of leaseholds was not bound to perform the covenants in the lease either for payment of rent or to repair, or otherwise. However, Stirling, J., in *In re Redding* (4), the late Vice-Chancellor of Ireland in *Kingham v.*

(1) [1893] 1 Ch. 61.

(3) 34 Ch. D. 136.

(2) [1898] 1 Ch. 232.

(4) [1897] 1 Ch. 876.

Barton, J. Kingham (1), and North, J., in *In re Betty* (2), took a different view of the decision of *In re Courtier* (3), holding that it only applied to the question before the Court in that case, which was as to the liability of the tenant for life to restore premises which had been allowed to get into disrepair before her tenancy for life began. In a subsequent case of *In re Giers* (4), Kekewich, J., relinquished his former opinion and decided in conformity with that of Stirling, J., North, J., and our late Vice-Chancellor. A case in point seems to be *In re Betty* (2), which was a case of an equitable tenant for life of leaseholds under a will. At p. 829 North, J., says:—"In my opinion, therefore, what the legatee must bear in this case is the obligation of the covenants in the lease which have to be performed by the lessee for the benefit of the lessor. They include the rent, of course, and repairs." Accordingly, dealing with this case on the hypothesis that the facts are as presented by the parties who are before the Court, I am of opinion that I must grant this application, and order the return of the deposit, and the payment of the costs of the investigation of title and of the application.

Solicitors for the purchaser: *Webb, Scott, & Seymour.*

Solicitor for the vendor: *Clifford Lloyd.*

J. MAC M.

(1) [1897] 1 I. R. 170.

(2) [1899] 1 Ch. 821.

(3) 34 Ch. D. 136.

(4) [1899] 2 Ch. 54.

ATTORNEY-GENERAL (CORK COUNTY COUNCIL) v.
PERRY.

(1902. No. 9.)

V.-C.
1902.

Nov. 19, 20,
21.

1903.

Jan. 21.

Appeal.

Feb. 19, 20,
23, 24.

April 21.

Highway—Right of way along road built along seashore at foot of cliff—Irregular strip of land between foot of cliff and water table on inland side of the road—Boundary of highway—Right of public to deviate.

The public had for many years a right of way for all ordinary purposes from K. to S. and back along a road called "the Long Quay." The road ran by the seashore, and was bounded on one side by the shore, along which a protection wall had been built, against which the sea washed. At either side of the road there was a water table; inside the water table on the land side lay an irregularly shaped strip of waste ground between the water table and a cliff, which in some places approached to within 3 feet of the water table. Except the water table there was no boundary between the metalled road and this strip of ground. The level of the strip varied in different places, from one foot to a foot and a half above the surface of the road. The defendant admittedly owned the land above the cliff in fee-simple, and the deed which conveyed this land to him purported to convey also the strip of ground at the foot of the cliff, "subject to all rights existing into or upon the same, or any part thereof." The strip of land was not included in an agricultural lease made some years previously by the defendant's predecessor in title to the tenant who still farmed the land above the cliff. The defendant had stored building materials on the strip of ground. Some of the inhabitants objected, and, claiming that the strip formed portion of the highway, sought an injunction to compel him to remove these materials:—

Held (affirming the Vice-Chancellor), that the onus of showing that the waste strip of ground had been dedicated as part of the highway lay on the plaintiffs, and that as the evidence adduced showed no use by the public of the strip as a highway, and as there was no obstruction by the defendant of the metalled road at the other side of the water table, the injunction should be refused.

TRIAL. The action was brought for the purpose of obtaining an injunction to restrain the defendant, his servants and agents, from putting, placing, keeping, or allowing to remain, or be, stones, building materials, and other matters, in, on, or near a certain

V.-C.
1902.

ATTY.-GEN.
(CORK CO. C.)
v.
PERRY.

public highway known as the Long Quay, at Kinsale, in the county of Cork, to the hindrance and obstruction of the public in the use of the highway, and for an order directing the defendant to carry away, and remove, the said stones, building materials, and other obstructions to the said highway.

The matter in dispute in the action was the right of the defendant to store materials on a strip of ground which lay to the north of the northern water table of the road known as the Long Quay, and between that water table and an adjacent cliff. The plaintiffs claimed that the strip in question was part of the highway, and the defendant claimed that it was part of his property which adjoined the highway. The question thus raised was really as to what was the boundary of the highway.

The statement of claim alleged that (1) the defendant is the owner of land adjoining a thoroughfare known as the Long Quay, Kinsale, in the county of Cork. (2) The said Long Quay is a public thoroughfare and a common highway leading from the town of Kinsale to the village of Scilly, and all His Majesty's subjects are entitled to the free and uninterrupted use of the said highway, to go, return, pass, repass, ride, and drive thereon, with horses, cattle, carts, carriages, and on foot, at their free will and pleasure. (3) The said Quay is about 600 yards in length, and is fenced and bounded on the outer or southern side by a sea wall which separates it from the seashore, and on the inner or northern side partly by a wall, and partly by the edge or face of a cliff which rises abruptly from the level of the said road, and constitutes for a considerable portion of the said Quay the inner fence or boundary thereof on the side farthest from the seashore. (4) Lying between the said inner boundary of the said Quay and the water table which skirts the metalled portion of the said road on the inner or northern side is a level grassy strip of land varying in width. The said strip is part of the highway, and down to the doing of the acts hereinafter set forth the public have at all times exercised the right to pass and repass, as aforesaid, freely and without interruption, over the said strip as well as over the metalled portion of the said road. (5) The statement of claim specified certain matters placed by the defendant on the said strip, which it alleged were obstructions, and hindered the free

passage of the public over the same. (6) The defendant, having refused to remove the said obstructions, was, in the year 1897, summoned by the Kinsale Town Commissioners, under whose control the said Quay then was, for obstructing the said thoroughfare. The magistrates refused to entertain the said summons on the ground put forward by counsel for the defendant that a question of title was involved. The said summons again came before the magistrates pursuant to a writ of *mandamus* issued out of the King's Bench Division of the High Court of Justice at the suit of the Commissioners directing the magistrates to hear and determine the same. Counsel on behalf of the defendant again contended that the soil of the said roadway was vested in the defendant, and the magistrates dismissed the summons, and refused to assign any reason for their decision, or to state a case for the Superior Courts. (7) The said Long Quay is the main thoroughfare leading through, and from, the town of Kinsale, on the northern and eastern side, and there is very considerable traffic over the same, more especially on fair and market days. By a declaration of the Cork County Council, made January 18th, 1900, and an order and declaration of the Local Government Board for Ireland, dated August 12, 1901, made in pursuance of sect. 8 of the Local Government (Ireland) Act, 1898, certain roads in the Kinsale Urban District, described in the schedule to the said declaration of August 12, 1901, which include the Long Quay, were declared to be main roads, and the duty and liability for the maintenance, upkeep, and supervision of the said Long Quay is thereby imposed upon the relators. The obstructions complained of are a serious public nuisance, and completely block up and render impossible the user by the public of the said Quay, and greatly hinder and impede the traffic on the said highway.

The statement of claim concluded with a prayer for an injunction in the terms above mentioned.

The defence alleged that the water table or channel running along the northern side of the Quay was the boundary of the highway, and that the strip of ground between that water table and the cliff mentioned in the statement of claim was not part of the highway, but was the freehold of the defendant: and that the public never exercised the right to pass and repass over this strip: the

V.-C.
1902.
ATTY.-GEN.
(CORK CO. C.)
v.
PERRY.

V.-C.
1902.

ATTY.-GEN.
(CORK CO. C.)
v.
PERRY.

defence also denied that the defendant had so used the said strip as to obstruct the highway.

The evidence given at the trial as to user and as to title is exhaustively reviewed in the judgments in the Court of Appeal.

Mathew J. Bourke, K.C., D. Henry, K.C., Conner, K.C., and Sheehan, for the plaintiff.

The Solicitor-General (J. H. M. Campbell, K.C.), Matheson, K.C., R. Barry, K.C., and Moriarty, for the defendant.

1903.
Jan. 21.

THE VICE-CHANCELLOR:—

This action has been brought at the instance and on the relation nominally of the County Council of the County of Cork, but really of some of the inhabitants of the Kinsale Urban District, who complain of an alleged interference by the defendant with a public highway leading from the town of Kinsale to the neighbouring village of Scilly.

A highway between these places has existed for a long period of years, and the right to it is not disputed by the defendant, who is the owner of the soil and freehold over which this highway is claimed.

The dispute really is as to the lateral extent of the ground over which the right exists. The defendant admits, and does not appear to have ever disputed, the right of the public to a way for all ordinary purposes from Kinsale to Scilly and back, along a road called the "Long Quay." This road runs by the seashore, and is bounded at one side by the shore, along which a protecting wall has been built, against which the sea washes, but at the other side the ground rises landwards in an irregular manner, and consists principally of natural rock, which has been cut away where necessary to form the surface of the road, but which remains in its natural state and formation where this has not been necessary. The ground above this and inland of it is unquestionably the property of the defendant. I am satisfied upon the evidence that before the road called the "Long Quay" was formed, the whole side of the hill ran down to the sea, and was the property in fee of the defendant and his predecessors in title. Those who were entitled to use this

as a public way or highway did not thereby acquire any estate in the soil, but only a right of passing over it as an easement. This right they were bound to use in a reasonable manner, and only so far as was necessary for a full enjoyment of the right of way.

V.-C.
1902.
ATTY.-GEN.
(CORK CO. C.)
v.
PERRY.

There has been here no evidence to show or lead me to believe that there was any interruption of, or any interference with, the free exercise of the right of all persons to pass and repass by it, on foot or on horseback, or in any kind of vehicle, or to drive their cattle or other animals from one end of it to the other, or any intermediate distance.

From the very nature of this strip of land it is incredible that it was used as a part of this highway. I do not believe that there was ever a reasonable or *bona fide* attempt, or intention, or desire so to use it. There has been no inconvenience to anyone caused by the acts of the defendant. He has not interfered with the public right of way if exercised, as it must be, in a reasonable manner. He admits that he has deposited large heaps of stone, quarried by him on his own land, upon portions of this space, and that this has of course prevented other persons from deviating in a similar manner, but the plain, direct, and level road has not been blocked or obstructed, and such persons have no right to deviate thus for their own caprice, and without any occasion or necessity for so doing.

I do not think it necessary to examine the evidence in this case critically, as I prefer to base my decision rather on plain and well-established legal principles, and to apply them to broad facts which seem to me to be reasonably free from doubt.

I am of opinion that the plaintiff has failed to establish his case, and I dismiss the action with costs to be paid by the relators.

D. M'C. M.

Appeal.
1903.

ATTY.-GEN.
(CORK CO. C.)

v.

PERRY.

Feb. 19, 20,
23, 24.
April 21.

The plaintiff appealed to the Court of Appeal (FITZ GIBBON, WALKER, and HOLMES, L.JJ.).

M. J. Bourke, K.C., and D. Henry, K.C. (with them *Conner, K.C., and Sheehan*), for the appellant.

The Solicitor-General (J. H. Campbell, K.C.), and Matheson, K.C. (with them *R. Barry, K.C., and Moriarty*), for the respondent.

The following cases were cited :—*Reg. (Rothschild) v. United Kingdom Electric Telegraph Co.* (1) ; *Turner v. Ringwood Highway Board* (2) ; *Belmore v. Kent County Council* (3) ; *The Queen (Collins) v. Justices of Fermanagh* (4) ; *Neld v. Hendon Urban District Council* (5) ; *Harrison v. Duke of Rutland* (6).

April 21.

FITZ GIBBON, L.J. :—

In this action the Cork County Council, as the local road authority, sue as relators in the name of the Attorney-General for an injunction to restrain the defendant from placing stones and building materials on or near a public highway, known as the Long Quay at Kinsale, to the obstruction of the public in the use of the said highway ; and for a mandatory injunction to remove certain stones which, since 1896, have been piled alongside the road, on the ground that they are an obstruction to the highway.

The property in the land is not directly put in issue ; rights of highway over it are asserted by the plaintiff, and unless such rights are proved to exist, and to have been obstructed by the defendant, the suit cannot be maintained. The highway claimed is a public thoroughfare leading from the town of Kinsale to the village of Scilly, and the public right claimed is to the free and uninterrupted use of the said highway, to pass and repass thereon with horses, cattle, carts, carriages, and on foot. The Quay is claimed to be about 600 yards in length, bounded on the outer side by a sea wall separating it from the sea shore, and on the inner side partly

(1) 31 L. J. M. C. 166.

(2) L. R. 9 Eq. 418.

(3) [1901] 1 Ch. 873.

(4) 14 L. R. Ir. 50.

(5) 81 L. T. 405.

(6) [1893] 1 Q. B. 142.

by a wall, and partly by the face of a cliff, rising abruptly from the level of the road, and constituting, for a considerable portion of the Quay, the inner boundary thereof, on the side furthest from the sea shore. Between this alleged inner boundary and the water table which edges the metalled road at that side, there is a strip of land varying in width, which is alleged by the plaintiff to be part of the highway. It is further alleged that, until the doing of the acts complained of, the public had at all times exercised the right to pass and repass over this strip, as well as over the metalled portion of the road; and that from 1896 the defendant had placed a considerable quantity of building materials on portions of this strip, so as to obstruct the passage of the public over it, but none of these obstructions project into the water table.

There is no evidence of trespass on, or obstruction to, the metalled road, though at one point, and for a considerable distance, the stones have been piled by the defendant close up to the water table.

The main defence is that the true boundary of the public thoroughfare is the water table, and that the strip of land inside it is not part of the highway. The defendant claims that strip as his freehold; but even if he has failed to prove his title, he is entitled to judgment if he has established the further allegation contained in his defence, that the public never exercised the right to pass and repass over that strip as part of the highway. Thus the case really turns upon a part and parcel question—What is the inner boundary of the highway in question? To extend the public right beyond the water table, it rests upon the plaintiff to prove a dedication to the public as a highway of the adjoining land.

Before considering the facts of the particular case, I think it convenient to state certain principles and presumptions which seem to be established with reference to the limits of a public highway. Here we must have recourse to presumptions, and to evidence of user, because no documentary evidence of title to the highway is now forthcoming.

Turner v. Ringwood Highway Board (1); *Nicol v. Beaumont* (2);

Appeal.
1903.
ATTY.-GEN.
(CORK CO. C.)
v.
PERRY.
Fitz Gibbon,
L.J.

Appeal.
1903.
ATTY.-GEN.
(CORK CO. C.)
v.
PERRY.
Fitz Gibbon,
L.J.

and *Reg. (Rothschild) v. U. K. Electric Telegraph Company* (1), show that, where a highway has been set out, or fenced at each side by metes and bounds, and afterwards, for a length of time, or in course of time, part only of the space so defined has been metalled and used as a road, the public right of passage, *prima facie*, and unless there is proof to the contrary, extends to the whole space set out; in the absence of clear evidence to the contrary, or with slight evidence of user of the land fringing the actual road, by foot passengers, or for other public purposes connected with the highway, even the owner cannot appropriate or obstruct the more or less waste and useless land adjoining the metalled road. But in such cases the proof of original dedication of the whole space rests on the plaintiff, though such proof is sufficiently supplied by the evidence of the original setting-out or fencing of the space in question.

On the other hand, where there is a defined and metalled road, edged by an appropriate water table, the mere fact that adjoining land, more or less waste and useless, is open and accessible from the highway will not, in the absence of other evidence, establish dedication of any land except that which has been actually used for highway purposes, and even slight evidence of user for private purposes, having regard to the character of the place in question, will establish the private right of exclusive occupation.

The highway in question here is peculiar in its construction, which took place before the period at which the evidence commences. The oldest map in evidence, the Ordnance Survey of 1842, shows that the Long Quay began as a street in Kinsale, fronted on each side by houses, ending as to half its width in a sort of slip or landing-place. The other half continued on, still fronted on the inner side for some distance by houses, and for a short distance further, in the same line of frontage, by the wall of a square enclosure, on which there are now out-offices of the defendant's house, which, in 1842, was the last house of the town on that side. At the opposite side the Long Quay was bounded as far as the defendant's house by the slip to which I have referred, and from that onwards for more than 600 yards the outer

boundary of this continuation of the Long Quay, so far back as the evidence goes, has been a retaining sea wall substantially constructed in a regular curve. The sectional map shows that throughout its entire length the foundation of this sea wall is below high water mark, and it, therefore, is on land presumably belonging to the Crown. The tide rises against the wall nearly to the level of the roadway, but the wall rises for several feet above the road, and forms a continuous fence. The work was necessarily costly; we may presume that it was a public work; though no documents are forthcoming to show when or how it was executed. This is probably due to the destruction of the Cork County Records by fire. The outer edge of this highway is presumptively public property, and its whole width is undoubtedly dedicated to the public use. But this leaves the question of its inner boundary still to be settled. The space appropriated to the purposes of the highway, in its construction, is ample for all purposes of public traffic. Immediately inside the wall there is an unusually wide footpath, bounded on the inside by the outer water table of the metalled road. Parallel with this, throughout its entire length, there is a second and similar water table, and between these water tables there is a metalled road of uniform and great width. Both water tables are shown on the map of 1842, and the inner one then started from the outer end of the wall of the square enclosure, which, as I have said, is now the site of the defendant's out-houses.

At a varying distance inside that water table, from end to end, the map of 1842 shows a continuous fence, starting behind the enclosure, from the rear of the defendant's house, gradually approaching the Quay as it goes away from Kinsale, and about half way from Kinsale to the far end of the place in dispute, striking the commencement of a cliff which gradually rises and becomes more precipitous, but comes nearer to the Quay, until at the far end it covers a considerable space of rocky ground, where the Long Quay meets another highway called Featherbed Lane, and turns down to the village of Scilly.

Returning to the sectional map, we find that for the first half of its length the highway was entirely formed of "made ground," and probably the filling extended for some distance inside the

Appeal.
1903.

ATTY.-GEN.
(CORK CO. C.)

v.
PERRY.

Fitz Gibbon,
L. J.

Appeal.
1903.
ATTY.-GEN.
(CORK CO. C.)
v.
PERRY.
Fitz Gibbon,
L.J.

water table; for the second half of the distance, the foot of the cliff extended beyond the inner edge of the road, which at that part was made sufficiently wide by lowering and levelling portions of the toe of the cliff itself, so that there the road rested at the inner side upon a sort of shelf, the outer side and wall being all through on made ground. There is no evidence that any substantial part of the land between the inner water table and the limit of the highway, as alleged by the relators, was ever below high water mark. At no point was the whole of that land below high water mark, and at the point where the defendant piled the stones the *substratum* must always have been above high water mark, and therefore it was presumptively the property of the private owner of the adjoining land.

Since the hearing before the Vice-Chancellor, a lease of the adjoining lands of Slaveen, dated June 27, 1840, from predecessors in title of the defendant to a tenant named Black, has been given in evidence. It gives a right of way to the tenant through a lane or passage opening off the Long Quay by a gateway, and running into the demised lands along the west side of the square enclosure beside the defendant's house, and this proves that at that date the outer wall of that enclosure was the inner boundary of the Long Quay as far as it went. The inner water table started from the end of that wall, and ran on in the same line, leaving land above high water mark inside it not visibly appropriated to the highway; there being no fence inside the water table, except the fence of the demised land on the higher level, I can find no evidence, unless supplied by proof of user, to extend the public highway rights beyond the inner water table, which was the visible limit of the roadway. I am confirmed in this by the description of the demised lands as bounded by "the cliff or rocks adjoining the Long Quay." These words indicate that all the space occupied by "the cliff or rocks," which may well include all the waste land outside the fence, *adjoined* the Long Quay, but *was not part of it*. It is also probable—and this probability was afterwards made a certainty—that it was intended that if any more houses were built they might be brought out to the same frontage with the existing houses—i.e. to the line of the water table.

An important change afterwards took place in or about 1847, when a new public road was made, branching off the Long Quay immediately beyond the defendant's dwelling-house, and trending to the left up the hill across the lands of Slaveen, until it reached Featherbed-lane, at the far end of those lands. This road started at the square enclosure, part of which was thrown into it, and upon what was left, and also upon the adjoining land, out-houses and another building, afterwards turned into dwelling-houses fronting the new road, were erected on the lower level, and outside the Slaveen fence. This new road went gradually up hill, and it was fenced on the outer side by the wall which the relators now claim to be the inner boundary of the Long Quay. This is impossible, for the site of the new road in 1842 was not part of the Long Quay, the wall was built for the purposes of the new road, and it had nothing to do with the limits of the Long Quay; and furthermore, the line of the old fence on the high road is still visible, and one of the old trees is still standing below the point where the new road crosses it. An angle of land formerly inside the old fence is now left at that point below the new road. This angle is the site of a bank of stuff thrown there by the defendant, and the deposit of this very stuff is alleged as a trespass on the Long Quay, because it is outside the wall of the new road. But this angle cannot be part of the Long Quay, unless it was dedicated to the highway when the new road was made, and if this wall is not the inner boundary of the Long Quay, there is no other visible boundary by which it can be defined, except the water table. Thus the relator is driven to proof of user, in order to extend the public highway beyond the visible roadway.

The evidence of user is conflicting; one class of it—certain convictions—appears to me to be difficult to reconcile with the defendant's case, and to require separate consideration; but I can find no evidence of the actual user of any land outside the water table for any strictly highway purpose; *i.e.* no one ever used the place in dispute as a *thoroughfare*. Most of the acts relied on by the plaintiff would be unlawful if done upon a highway; nets were dried, boats were repaired, timber was stored, and travelling shows were set up upon it; road contractors stored materials upon it, but this was done more by contractors

Appeal.
1903.
ATTY.-GEN.
(CORR CO. C.)
v.
PERRY.
Fitz Gibbon,
L.J.

Appeal. for other roads than by the contractors for the repair of the
1903. Long Quay itself.

ATTY.-GEN. Upon the other hand, the most important use made of the
(*CORK CO. C.*) space in question was for the purpose of storing considerable
v. quantities of timber for considerable periods while awaiting
PERRY. shipment, and this is proved to have been done either by the
Fitz Gibbon, defendant or with his permission, and on payment to him or for
L.J. his benefit. Other instances of use or control by the defendant or
by the tenant of Slaveen are proved, and although the strip in
question was not included in the demise, the acts of the tenant
may be attributed to the right of his landlord, *i.e.* of the defen-
dant or of his predecessors in title.

The convictions are evidence that the *locus in quo* was, for the purposes of them, part of "the Long Quay." The defendant is brought into privity with them as a magistrate. Some of them might be sustained under the Public Health Acts, but in two at least the gist of the offence was that the place was a highway. But they are not conclusive, and they are not, in my opinion, sufficient to establish the relator's case as against the other evidence.

On April 6, 1877, the defendant took a conveyance for £1625 of—(1) the tenanted lands of Slaveen; (2) the cliff, rocks, and other land lying between the tenanted land and the Long Quay, and (3) the slob land outside the Long Quay. Though the strip in question was conveyed, the grantors gave no covenant for title to it or to the slob land, and both were conveyed subject to all existing rights. This deed leaves the question in doubt, but it is no evidence of existing rights of highway. The then existing lease of Slaveen, from the grantors to Dora Black, was dated 24th March, 1873. It describes the demised lands as bounded on the south "by the cliff or rocks adjoining the Long Quay," thereby showing that, on that side, whatever portion of the earth's surface was occupied by this cliff and rocks was excluded from the Long Quay, and this abuttal includes the actual site of the defendant's pile of stones. But another abuttal in the same lease was much relied on by Mr. Bourke, for the demised lands are described as bounded "on the west by the Long Quay." He contends that this shows that the Long Quay extended up to the new road. But if

we trace "the cliff and rocks"—not as a perpendicular wall having no width, but as rocky rough land lying between the old fence and the water table from Featherbed Lane westwards as far as the new road—the western abuttal will be very short indeed, and will include the angle of land which was originally inside the old fence on the upper level, but is now outside the wall of the new road which the plaintiffs claim to be the boundary of the Long Quay. This western abuttal is not conclusive—it may be accounted for by a mere omission to notice the waste ground on the lower level, or by mere inaccuracy. The question still remains whether the plaintiffs have established any dedication or user as a highway of the waste land above high water mark outside the old fence and between it and the water table.

I shall not waste time in anticipating my colleagues by going in detail through the somewhat unsatisfactory testimony, on both sides, as to permission, payment, and other circumstances attending the user of the disputed ground, but on the broad question I find, as a juror, that no public right of highway has been established outside or beyond the ample space occupied by the visible road with its sea wall, footway, and water tables. The defendant has not obstructed that space, and therefore, in my opinion, the relator has failed to prove a vital matter where the burden of proof lay on him, and the appeal should be dismissed with costs.

I close with the observation that, in cases of this kind, regard must be had to the nature and character of the land in question, when considering evidence of user. The land here was of little use to anyone, it was incapable of profitable user to any substantial extent, it was open to trespass, and under such circumstances the casual use of it for such purposes as the standing of cattle, the temporary storage of stones, the deposit of rubbish, or the like, cannot establish public rights of highway, or defeat private rights of ownership or occupation. On this point *Neeld v. Hendon Urban District Council* (1) is an important authority, which shows that even the presumption arising from the existence of an ancient fence will not always prevail—and *Belmore v. Kent County Council* (2) is an authority in favour of the defendant.

Appeal.
1903.

ATTY.-GEN.
(CORK Co. C.)
v.
PERRY.

Fitz Gibbon,
L.J.

(1) 81 L. T. 405.

(2) [1901] 1 Ch. 873.

Appeal.
1903.

ATTY.-GEN.
(CORK CO. C.)
v.
PERRY.

WALKER, L.J. :—

I also am of opinion that the plaintiff has failed to establish that the strip in question forms part of the road or highway on the Long Quay. The relators are a highway authority, and the plaintiff for them seeks to extend the road in question laterally for highway purposes up to the retaining wall of the eastern road and the line of cliffs or rocks, which both, as he contends, form the northern boundary of the road. In my opinion this contention is opposed to the nature of the subject as it has existed from the earliest period we have evidence of, and to the user by which plaintiff himself supports his case.

The metalled road, which is from 20 to 25 feet in breadth, and the adjoining footway, which is from 18 to 22 feet in breadth, are more than sufficient for all purposes of all kinds of traffic, and there is almost an absence of evidence of any actual highway use by the public of the strip in dispute. But, conceding this much in favour of the defendant, which, indeed, is sufficient to dispose of the present action, I desire, so far as I am personally concerned, to abstain from expressing any opinion whatever that the defendant is entitled to obstruct, by the placing of stones, or in any other manner, the appropriate use by the public of whatever is Long Quay, which, I personally think, embraces much more than the site of the metalled road and footway ; and further, so far as I am concerned, I desire to abstain from expressing any opinion whatever that the strip in question is all the freehold of the defendant, or that he has a right (as he claims) to use it in any way he pleases.

The strip of ground which is mainly in question, and on which the obstructions have been placed by defendant, consists of what, in his conveyance of 1877 and map thereon, appears coloured yellow, lying north of what is on this map called Long Quay, and is in the deed described as—“All that and those that other portion or part of the said lands of Slaveen, as consists of the small plot of ground bounded on the north partly by the eastern road, and partly by portion of said lands so demised to said Mrs. Dora Black, and on the south by the Long Quay.” And this portion of the lands demised to Mrs. Dora Black is described in her lease of 1873, there referred to, as bounded “on the south by

the cliff or rocks adjoining the Long Quay, and on the west by the Long Quay," which description of what is Long Quay does not fit in with the description of what is Long Quay in the grant of 1877, as appearing on the map to the deed. That description in the deed of 1877, and map thereon, abridges the area of "Long Quay" considerably.

Appeal.
1903.
ATTY.-GEN.
(CORK CO. C.)
v.
PERRY.
Walker, L.J.

The impression which I have formed from the map and documents is that nearly all the strip in question forms part of "Long Quay," and that there are public rights over it; but, as I have already said, the plaintiff is not in this action entitled to succeed on any such ground.

A quay is, as its name imports, a wharf or landing-place—a place for landing and unloading vessels; and my impression is that it was designed and constructed for that purpose, though it was, and is, also the site of the road.

Taking quay in that sense, it is not easy to find its boundaries and limits on the western end, owing to the construction of the eastern road across it, and there seems to be ground for concluding that at the end private property intervened; but it is easy to find them on the eastern end, where they include the strip in question, and that which is in the second grant in the deed of 1877, which I have read.

The inference which I draw from the facts and circumstances is that the foreshore, and also a small fringe which was not foreshore, lying to the south of the cliffs and rocks, which now form, for the most part, the northern boundary of the Quay, were used for the purpose of constructing the Long Quay. Jutting rocks running down in ridges to the sea were levelled. A sea wall, raised a few feet above the level of spring tides, was built, and the space between the top of this sea wall and the cliffs, which space was raised and levelled up to the irregular line of cliffs, artificially formed the desired Long Quay. Before the construction of the Quay the spring tides must have nearly reached the base of the cliffs. The portion south of the road seems to me to have been Long Quay, and so also the portion north of it.

This Quay, so far as material, is some 400 yards in length, and a metalled road was made on it, roughly speaking, in its centre.

Appeal.
1903.
ATTY.-GEN.
(CORK CO. C.)
v.
PERRY.
Walker, L.J.

The strip of ground lying between the regularly formed road and the cliffs is what is in dispute in this action. This adjoining strip is in some places level with the formed road, and in other places it lies higher, the height varying from one to two feet; and by reason of the irregularity of the line of cliffs, the breadth of the strip varies from three feet, in at least one place, to an extreme breadth of forty-seven feet. It is mainly covered with rough grass, with partially levelled rocks showing here and there.

There is no doubt that the defendant, some time before this action, placed, for his own purposes, a heap of stones on the strip in question, four to five feet high, and about 120 yards long, and occupying almost the whole space between the edge of the cliff and the water channel of the road. There were Petty Sessions proceedings, and a question of title having been successfully raised, the present action has been brought by the Attorney-General at the relation of the Cork County Council. The case for the plaintiff is that the place where the stones have been deposited is part of the public highway, which the public have the right to use as such, and an injunction is sought against the obstruction. The defendant, on the other hand, contends that the strip is his freehold, and not part of the public highway, and that the public never exercised highway rights over it, and that since the year 1877 he has used this strip in any way he pleased. The Quay appears to me adapted and designed for the purposes which its name imports. There are boat slips at each end of it, and the road on it forms a convenient line of connection between the western and eastern portions of Kinsale, and also a communication with the village of Seilly, which lies below, jutting out and narrowing the entrance by which the sea approaches, and at high water washes the sea wall, at the south side of the Quay. The only documents of title which we have in the case correspond with the description of Long Quay.

The lease of 27th June, 1840, to James Black, demises $6\frac{3}{4}$ acres of Slaveen, one of the boundaries of which is the cliff or rocks adjoining the Long Quay, and another boundary is a lane or passage leading into the lands of Slaveen from the Long Quay, with a passage for horses, carts, and cattle—a passage which appears on the map. The lease of 24th March, 1873, contains the same descriptions. The defendant's title-deed of 6th April, 1877, is

certainly one which, even as a paper title to the strip in question, does not afford him much help. It recites an agreement to purchase the land of Slaveen in Black's lease, and also the premises marked yellow on the map, so far as the vendors had any estate therein, and such right or title as they had over that part of the Quay or Roadway opposite the house now occupied by Margaret Perry, coloured red. The conveyance then is of, first, Black's portion; secondly, that part of Slaveen bounded as I have already mentioned, and that part of the slob bounded on the north by the Long Quay; and thirdly, all the right they had over that part of the Quay or Roadway opposite the house occupied by Margaret Perry, coloured red, subject, as to the premises, secondly and thirdly, granted, "to all rights now existing into or upon the same or any part thereof." The strip now in dispute is thrown into this very doubtful category.

The evidence as regards user is on both sides unsatisfactory. A good deal of the evidence of user which has been given seems to me much what might be expected in the case of a quay, but is not appropriate to a highway. For instance, nets were dried on it by fishermen; boats were made and repaired on it; fish boxes were placed on it; cargoes of pitwood were left there before shipment and after discharge; carts stood there waiting for fish to be landed from boats; spars and sails were made on it, and sand and seaweed from the slob were left there. It appears that for many years road material, stones, etc., were left there by contractors, some of them working for the Town Commissioners, some of the material was for the road in question, and some for other roads. Since 1863 fairs have been held there. The defendant says he was not aware of this, which I cannot credit, as they were visible from his own premises, and he was seen at a fair by one witness. The inference which I draw is that the defendant, some time after his purchase, in 1877, began to make a case of private ownership, and there is no doubt evidence that several persons asked permission from him to place stones and other things there. It appears to have been readily given, and Hogan, who asked for it, also took care at the same time to get leave from the Town Commissioners. His letter of 12th April, 1898, has been proved.

It is very difficult to understand why the defendant appealed to

Appeal.
1903.
ATTY.-GEN.
(CORK CO. C.)
v.
PERRY.
Walker, L.J.

Appeal. 1903. the Chairman of the Town Commissioners for leave to put stones on the place if it was his own property. The reason he gives for asking permission seems to me incredible. Two of those to whom he says he gave permission were actually fined by the Town Commissioners for placing stones there.

ATTY.-GEN.
(CORK CO. C.)

v.

PERRY.

Walker, L.J.

I am not much impressed by the evidence given by him, and on his behalf, as to giving permission to circuses, merry-go-rounds, and photographers.

The seven convictions at the suit of the Town Commissioners, ranging from 4th April, 1882, to 31st October, 1896, are very important. That against Murphy is for placing stones on the Long Quay at the spot where the defendant has placed his. All the convictions are for acts in connection with the Long Quay, though two of them are for causing a nuisance, and in two cases the defendant himself acted as one of the convicting Justices. "Street," which was the word used in some of the summonses, includes, by the Act of 1854, "road, and thoroughfare, or public passage."

Upon the whole, while I concur in a dismissal of the action, I am not to be taken as expressing any opinion in the defendant's favour as to his having any title to the strip in question, or as to his right to exclude the public; such questions may arise in another action, and if I did not so guard myself, it might be taken that the defendant's success involved all the rights he has claimed in his pleading.

HOLMES, L.J. :—

The Attorney-General at the relation of the Cork County Council seeks in this action to restrain the defendant from placing building materials and other obstructions upon a public highway leading from the town of Kinsale to the village of Scilly. The highway in question, together with a street of the town of which it is a continuation, is about 600 yards in length, runs from west to east, and bears the name of the Long Quay. The statement of claim gives as its boundary on the southern side a sea wall separating it from the sea shore; and as to this there is no controversy. The subject of dispute is the northern boundary, which is described in the plaintiff's pleadings as being "partly a wall and partly the edge or face of a cliff which rises abruptly from the level of the road and constitutes for a considerable portion of the Quay the

inner fence thereof on the side farthest from the sea shore." The defendant's contention will be best understood by referring to the physical features of the ground. Next to the sea wall there is a pathway for foot passengers, varying in breadth from 18 to 22 feet. This is separated by a channel for carrying off surface water from the macadamized carriage road, which is from 20 to 25 feet broad. There is then another water channel, between which and the northern boundary claimed by the County Council lies a strip of land, varying in breadth from 3 to 47 feet. This piece of ground, hitherto of small value for any purpose, has supplied the battlefield not only for the present action, but also for considerable previous litigation. The defendant has placed and insists on keeping thereon a pile of rubbish and a large quantity of stones, asserting that it is his private property, that the highway does not extend beyond the northern or inner water channel, and that this is the limit of the public right. The case has been very fully argued; and much time was occupied in the discussion of topics that seem to me to have but a remote bearing on the question for decision. For example, the boundaries set forth in a lease of the 24th March, 1873, and the parcels granted to the defendant by the deed of conveyance of the 6th April, 1877, under which he claims, have been compared and minutely criticised; but in truth neither document gives much help. There is, I think, no doubt that the deed of conveyance purports to include in the grant the strip of land to which the defendant is now asserting title; and it is, I think, also clear that it was not included in an agricultural lease made by the grantors four years before. But the inclusion or omission is equally immaterial. As the land is useless for agricultural purposes, I should not expect to find it demised by the lease, while the grant of it in the deed is declared to be "subject to all rights now existing into or upon the same or any part thereof." The public right sought to be enforced does not depend upon ownership of the soil. If the land in dispute be part of the highway, the defendant, however good his title to it, ought to be restrained from acts which admittedly obstruct its use by the public. If it is not part of the highway, the plaintiff's case is not advanced by showing that the defendant is not the owner.

Appeal.
1903.

ATTY.-GEN.
(CORK CO. C.)

v.
PERRY.

Holmes, L.J.

Appeal. In ascertaining the lateral boundaries of a highway, considerable assistance is often derived from the appearance of the place itself. There are generally to be found on each side of a road used for public traffic fences separating it from the adjoining lands, and apparently coeval with the dedication of the way. There is ample authority for holding that *primâ facie*, and in the absence of evidence to the contrary, the whole of the space thus enclosed constitutes the highway, even although only portion of it is the *via trita*: *Rex v. Wright* (1); *Regina v. United Kingdom Electric Telegraph Company* (2); and *Turner v. Ringwood Highway Board* (3).

1903.
ATTY.-GEN.
(CORK CO. C.)
v.
PERRY.
Holmes, L.J.

Counsel for the plaintiff have sought to apply this proposition in the present case; and as, in my opinion, it furnishes the strongest argument in favour of the County Council, I propose to consider it first. The highway with which we are dealing was in existence before living memory; and no evidence of its origin has been given. It is said that the County Records were destroyed by fire a few years ago; but it is almost certain that this road, although probably the result of public expenditure, was not constructed under the provisions of the Grand Jury Act of 1836. It is shown in the earliest Ordnance Survey of this district, dated 1842; and as at that time Scilly was as important a suburb of Kinsale as it is at present, it is probable that the road connecting them was even then old.

One thing, however, is certain, whatever was the date of its construction—its present site, at least to a large extent, was once foreshore, over which the tide ebbed and flowed. The wall, which is admitted to be the southern boundary of the highway, is a retaining wall against the sea, and was erected to protect a causeway artificially raised upon the rocks, sand, and shingle of the shore. It is argued that a road so constructed would be placed immediately adjacent to the base of the cliff which had theretofore repelled the tidal waters; and there is evidence that the piece of ground lying between it and the inner water channel was at some period trimmed and levelled. But even if this was done in connection with the original formation of the highway, it is diffi-

cult to believe that the object was to make the space in question fit for the use of the public. It is for a considerable distance formed of rocks, covered until recently with a thin grassy surface. It is not of uniform level. In some places it is at least 18 inches; in other places it is a foot higher than the metalled road; it also varies greatly in width. For what kind of traffic could it have been intended? Not for foot passengers, for there is an exceptionally broad pathway alongside the sea wall. Not for vehicles, for between the water channels there is a road on which three or four carriages could be driven abreast. No horseman would think of riding on it; and with the exception of one unconvincing witness, who says he has seen it walked on, but not often, many years ago, no one has testified to its user as part of the highway.

I have thus far confined myself to the position of the road that runs along the base of the cliff, with the result that I am unable to draw any inference in favour of the plaintiff either from its present appearance or from what I know of its origin. But this does not comprise all the ground in dispute. The cliff, which rises abruptly to a height of 30 feet at the eastern end, gradually sinks in the direction of Kinsale to an elevation of 10 or 12 feet at a point where it disappears, and its place is taken by the wall which the County Council claims to be the northern boundary of this part of the Long Quay. Judging by the map, I would say that the cliff runs for about 240 yards, and the wall for 110; but although the wall is much the shorter of the two, the land between it and the water channel is at least equal in area to that south of the cliff, and would probably be of greater value to a private owner. Fortunately, we know when and for what purpose this wall was built. I have already referred to the original Ordnance Survey of 1842. The map then made was offered in evidence on behalf of the plaintiff at the hearing before the Vice-Chancellor, but Mr. Matheson succeeded in having it excluded. Here, however, he wisely withdrew his objection; and I have found it the most valuable document in the case. It shows the Long Quay and its two water channels just as they are now, with the single difference that there was then no wall. The cliff, with a row of trees on its summit, is clearly delineated, but instead of forming a

Appeal.
1903.
ATTY.-GEN.
(CORK CO. C.)
v.
PERRY.
Holmes, L.J.

Appeal.
1903.
ATTY.-GEN.
(CORK CO. C.)
v.
PERRY.
Holmes, L.J.

junction with a wall, the line of trees is continued unbroken to the rear of the nearest town tenement, and either it or the water channel forms the only visible boundary to the north of the road. The wall was built at a date long subsequent to 1842, and was not intended to mark the northern limit of the Long Quay. Some years ago a new road was made for the purpose of connecting Kinsale with Belgooly. This, called the Eastern Road, starts from the end of the town, and the wall is its southern boundary. It is clear from a comparison of the place as it now is with the old map, that not only this wall as far as the cliff, and the portion of the Eastern Road adjacent thereto, are south of the line of trees, but that two or more houses which have been erected since 1842 are also south of it.

The natural inference from this is that the line of trees could not have been the northern boundary of the Long Quay, and that such boundary was the water channel. This inference is confirmed by another circumstance appearing on the Ordnance Map. The Long Quay road is, as I have already said, a continuation of a street of Kinsale, also called the Long Quay, of which the northern boundary is the front of the houses; and the map of 1842 shows the water channel to be in an even, or almost even, line with this frontage. I am, therefore, reasonably satisfied that from the street to the cliff the water channel marks the limit of the highway; but if this be so as far as the cliff, ought I not, unless there is evidence to the contrary, to assume that it continues to be the limit beyond that point? Of course the inference thus drawn from the past history and the present physical features of the place would be of little value as against evidence showing that the ground in dispute has been treated and used as part of the highway. So far, however, from there being evidence of this kind, the facts relied on to support the contention of the County Council are either ambiguous or more consistent with the defendant's case than theirs. They have failed to prove that it was ever used, or ever fit to be used, for any kind of public traffic. It appears that since the year 1863 monthly cattle fairs, which were previously held elsewhere, have been held on the Long Quay; and great stress is laid on the fact that the cattle on these occasions occupy the place in dispute, as well as the metalled road-

way. Such a use of a public thoroughfare, commencing at so recent a date, is of very doubtful legality; and in any case it throws little light on the lateral limits of the highway. There is evidence that contractors for the repair of roads in the district have, from time to time, used the ground in controversy for depositing and preparing the stones required for their contracts. It is usual to have on the side of highways spots provided for storing and breaking road metal; and I have no doubt that they, like the rest of the way, are dedicated to the public, although no traffic passes over them. But the places I have referred to are of very limited extent, and easily recognised. It would be absurd to suppose that a strip of land of the length and breadth of the ground in question was ever intended for this purpose; and its occasional use, therefore, is of little weight. Much reliance has been placed on seven convictions or orders obtained at Petty Sessions, from 1882 to 1896, by the clerk and executive sanitary officer of the Kinsale Town Commissioners in respect of offences committed on the Long Quay. Some of these are ambiguous as to the nature or locality of the offence; but in at least two the conviction was for obstructing the Quay by placing building materials on the ground in question. The effect of this evidence is, however, weakened by the result of similar proceedings taken against the defendant. About eight years ago he sent a message to the Chairman of the Town Commissioners asking permission to place some rubbish or shingle between the water channel and the wall or cliff. He was told in reply that no objection would be made, whereupon he piled up first a heap of refuse, and afterwards a quantity of stones, both of which are there still, and constitute the obstructions complained of in this action. The reason given by the defendant for applying to the local authority for permission is neither satisfactory nor clear; but both before and after he did so, he claimed to have absolute control over the place where the rubbish and stones were placed.

Having refused to remove them, he was proceeded against at Petty Sessions, which tribunal declined to adjudicate on the ground that a question of title was involved. The complainant, however, applied to the King's Bench Division for a writ of mandamus directing the Justices to hear and determine the com-

Appeal.
1903.

ATTY.-GEN.
(CORR. CO. C.)

PERRY.

Holmes, L.J.

Appeal.
1903.
ATTY.-GEN.
(CORK CO. C.)
v.
PERRY.
Holmes, L.J.

plaint; and the writ was granted, I presume, upon the ground that the only matter in controversy was the lateral extent of the highway. As the magistrates dismissed the case when it was sent back to them, they must have held that the public right did not go beyond the water channel.

The foregoing is an abstract of the evidence relied on by the County Council, from which the Court is asked to infer that a strip of land lying alongside a metalled road, but never used for public traffic, is part of the highway. I doubt if this inference could be drawn, even if there were no other evidence in the case; but it becomes impossible to do so in the face of what has been proved by every witness acquainted with the locality. There is a body of testimony, convincing and uncontradicted, showing that as long as memory goes back the disputed land has been used for purposes to which a public thoroughfare could not be legally applied. Nets have been made, repaired, and dried on it; boats, gates, and spars have been constructed on it; boxes of fish have been placed on it; it has been a receptacle for stones, timber, pitwood, anchors and chains; it has been used as a site for penny gaffs and other shows; and even a photographer has used it as a stand to ply his trade. Being neither, on the one hand, dedicated to the public for the purpose of traffic, nor, on the other, capable of profitable use by a private owner, it came to be regarded by persons in the neighbourhood as a place that might be occupied for temporary convenience. The defendant, since his conveyance of 1877, and especially in later years, has endeavoured to obtain recognition of his title from these casual occupants; and I think it has been shown that in most cases recently they have acted under his license. I do not, however, attach so much importance to this. The relief asked for in the action can only be given on proof that the land north of the inner water channel is part of the road; and the plaintiff having failed to show this, judgment was rightly given for the defendant, and the appeal must be dismissed.

Solicitor for the plaintiff: *A. H. Exham.*

Solicitors for the defendant: *Thomas Wright & Sons.*

G. Y. D.

HORRIGAN *v.* HORRIGAN (1).

(1902. No. 94.)

Appeal.
1904.

Jan. 29.*Will—Condition precedent or subsequent.*

APPEAL by the plaintiff from the judgment of the Vice-Chancellor, reported *ante*, p. 29.

D. F. Browne, K.C., and *P. Lynch*, for the appellant.

Matheson, K.C., and *Charles Doyle*, for the respondent.

THE COURT dismissed the appeal with costs.

Solicitor for the appellant : *P. S. Connolly*.

Solicitor for the respondent : *James A. Doyle*.

G. Y. D.

(1) Before FITZGIBBON, WALKER, and HOLMES, L.JJ.

Appeal.
1904.

IRISH LAND COMMISSION *v.* ANNESLEY (1).

(1902. No. 183.)

Jan. 14, 15,
18, 19.
Feb. 27.

Tithe rentcharge—1 & 2 *Vict. c. 109, ss. 7, 9*—*Charge on "perpetual estate," not on fee-simple.*

Tithe rentcharge is a burden on the first estate of inheritance, or the first perpetual estate equivalent thereto, and not on the fee-simple of the lands, unless the fee-simple is or becomes the first estate of inheritance.

Accordingly, where the owner of a lease for lives renewable for ever, who, as owner of an estate equivalent to a perpetual estate, was liable to pay the tithe rentcharge, assigned his interest to a pauper in order to avoid liability to future rent, and default was made in payment of the tithe rentcharge by the assignee, it was held by the Court of Appeal, affirming the decision of the Master of the Rolls, that the arrears of the rentcharge could not be recovered from the owner in fee.

APPEAL by the Irish Land Commission from the judgment of the Master of the Rolls, reported [1903] 1 I. R. 429, where the facts are fully stated.

Ronan, K.C., and Kenny, K.C. (with them *M'Carthy Mahony*), for the appellants.

F. Fleming, K.C., and Oulton, K.C., for the respondent.

The arguments were the same as already reported in the Court below.

Feb. 27.

HOLMES, L.J., delivered the judgment of the Court:—

Mr. Charles Annesley, one of the defendants, under the provision of an indenture dated the 28th August, 1846, is tenant in tail male in possession of the lands of Ballysax Hills and Moortown, subject to a term of 500 years, vested in the other defendants on trust to raise certain charges, and subject also to a lease dated

(1) Before LORD ASHBOURNE, C., and FITZGIBBON, WALKER, and HOLMES, L.JJ.

the 19th August, 1806, for lives renewable for ever, reserving an annual rent equivalent in present currency to £70 0s. 5d., the lessee's interest in which was, previous to the year 1896, vested in John Howard Parnell.

Appeal.
1904.
I. LAND COM.
v.
ANNESLEY.

Holmes, L.J.

The lands are liable to and charged with annual tithe rent-charge payable to the plaintiffs of £2 16s. 2d. on Ballysax Hills, and 15s. 4d. on Moortown; and inasmuch as the term created by the demise of 1806 was such an estate as rendered the lessee liable to the payment of this charge, Mr. Parnell paid these sums as long as he held the premises. He and his predecessors in title probably made a considerable profit rent by sub-letting; but this disappeared when some years ago the rent payable by Anne Daly, the tenant in occupation, was reduced to an annual sum one penny less than the rent reserved by the lease of 1806. In this state of circumstances Mr. Parnell relieved himself from liability to rent, tithe rentcharge, and all other burdens incident to his tenure by assigning by deed dated the 12th March, 1896, his interest to John Giffney, a pauper whose position enables him to offer a passive but thoroughly effective resistance to all pecuniary demands. The receiver appointed over the defendant's lands during the latter's minority, being unable to obtain money from Giffney, served notice under the 20th section of Deasy's Act on Mrs. Daly, requiring her to pay him the rent payable by her to Giffney, which she has since done, with the result of discharging the rent reserved by the lease of 1806 less by one penny; but the plaintiffs have received no tithe rentcharge since Mr. Parnell's assignment. Hence this action, which seeks for a declaration that the two rentcharges are charged on the fee-simple and inheritance of the lands in respect of which they are payable, and that the arrears and accruing gales thereof may be raised by sale, or out of the rents and profits by the appointment of a new or by the extension of the present receiver.

I must refer again to the peculiar character of the suit and of the relief asked for; but I think that it will be more convenient if, before doing so, I consider the origin and incidence of tithe rentcharge. This impost on lands was created by an Act passed in 1838, 1 & 2 Vict. c. 109, and although it took the place of "compositions for tithes" and "compositions in lieu of tithes,"

Appeal. which were the creatures of earlier statutes, it differed from them
 1904. essentially in both name and nature.

I. LAND COM. Lord Selborne, in *The Irish Land Commission v. Grant* (1),
 v. pointed out the distinction between tithes and tithe rentcharge in
 ANNESLEY. words which are almost equally applicable to the difference
 Holmes, L.J. between tithe rentcharge and the compositions for which it was
 substituted. "Liability to the new tithe rentcharge was imposed
 upon different lands and persons in a new manner. The former
 remedies were not preserved; new remedies were given; and in-
 stead of leaving an intention to apply the old law generally to
 the new rentcharge to be collected by any kind of implication or
 inference, the Act contains carefully detailed and explicit pro-
 visions for all the particular cases and circumstances for which it
 was thought necessary to provide." For this reason an elaborate
 examination of the previous legislation is not likely to throw
 much light on the construction and effect of the Act of 1838;
 but the nature of the change introduced by that statute will be
 better understood by a brief reference to the previous law. Tithes
 must have been at all times and in every country an inconvenient
 species of property; but in Ireland, in the early part of the nine-
 teenth century, they had become worse than inconvenient—they
 were the cause of much social disorder; and in the interest of the
 State it was necessary to make some change in their character
 and incidents. This emergency is stated in moderate language in
 the preamble of Goulburn's Act, 4 Geo. 4, c. 99:—"Whereas
 various circumstances relating to the agriculture and population
 of Ireland, and which do not apply to Great Britain, render it
 peculiarly expedient that for the purpose of further encouraging
 the industry and enterprise of owners, farmers, and occupiers of
 land, and rendering the incomes arising from tithes there more cer-
 tain in amount and more easy of collection, and of avoiding con-
 troversies respecting the same, provision should be made for the
 authorising compositions to be made for tithes in Ireland only, to
 endure for a time to be limited." This, the first legislative
 attempt to deal with the tithe difficulty, was not of a drastic
 character. The object was to substitute for tithes annual sums
 of money charged on the lands in respect of which tithes might

previously have been claimed, but these compositions were voluntary and therefore partial, and were only to last for twenty-one years. As tithes were collected in kind from the produce of the land, so this money substitute was to be paid by the person to whom such produce belonged. The tithe owner could proceed against the occupier and the lands in his hands by the ways and means allowed by law for the recovery of rent, but if payment could not be enforced in this way, he was not entitled to have recourse to any interest in the lands superior to that of the person in occupation.

The only other change of importance was that in the case of any new letting at a rack-rent in a parish where a composition had been made under the Act, the demise was to be tithe-free as between the landlord and tenant, and the latter was entitled to deduct the composition paid by him from his rent. As might have been expected, Goulburn's Act did little to bring peace to Ireland, and some years later Stanley's Act, 2 & 3 Wm. 4, c. 119, was passed, making compositions compulsory and therefore universal, and declaring them to be permanent. It also introduced important changes in the mode of enforcing their payment. Section 12 provided that no person holding land as tenant at will, or tenant from year to year, or having any lesser estate or interest therein, should be liable to pay the composition, and that the person having the first estate and interest greater than such tenancy was to be liable therefor. On the expiration of such first greater estate, the liability was to devolve on the person having the next greater, and so on upon the determination of each successive estate until the liability would eventually attach and devolve upon the person having the fee-simple and inheritance, who should be and remain for ever subject thereto. As long as the tenant at will or yearly tenant remained in possession the landlord would be entitled to recover from him as an addition to his rent the amount of the composition theretofore payable by him; but where land was let or demised after the passing of the Act, the tenant was to be free from tithes, and all contracts to the contrary were to be void. Payment of the composition could be enforced from the person liable thereto by Bill in Equity, by action for debt, or by civil bill; and, where he was in occupation, by distress;

Appeal.
1904.

I. LAND COM.
v.
ANNESLEY.
Holmes, L.J.

Appeal.
1904.

I. LAND COM.
v.

ANNESLEY.

Holmes, L.J.

and where he was not in occupation, a receiver might be appointed by a Court of Equity to receive such part of the rent as would be sufficient to pay the arrear of composition due and unpaid. It will be noted that an important feature of this enactment is that the composition can only be recovered from the owner of a particular interest in the lands. Great care is taken to specify such interest, and it may alter as circumstances change; but for the time being the liability attaches to one interest only.

I come now to the Tithe Rentcharge Act of 1838. As I have already said, it is complete in itself, and its object, as stated in the preamble, is "to abolish composition for tithes in Ireland, and in lieu thereof to substitute rentcharges payable by persons having a perpetual estate or interest in the lands subject thereto, a reasonable allowance being made for the greater facility and security of collection arising out of such transfer of liability from the occupiers to the owners of lands." The leading provision is to be found in section 7:—"Be it enacted that every parcel of land charged with or in respect whereof the said tithe compositions or any applotment or assessment thereof would have been payable if this Act had not been passed, shall be and become severally liable to and charged with the payment of an annual sum or rentcharge equal to three-fourths of the annual amount of such tithe compositions." I pause here to say that these words furnish the foundation of the plaintiffs' argument. Their counsel contend that the tithe rentcharge by being thus charged on the parcel of land is necessarily charged on every estate and interest therein; and if the clause ended at the point where I have stopped, this would doubtless be the true construction; but it proceeds, "and such rentcharge shall, except as hereinafter excepted, be payable by the party having in such lands respectively the first estate of inheritance or other estate and interest equivalent to a perpetual estate or interest as hereinafter defined, under which or derived wherefrom there shall be no such perpetual estate or interest." I am of opinion that the effect of this provision is to declare that the tithe rentcharge, save in the excepted cases, can only be recovered from the party thus specified or from his estate; and every other provision in the Act confirms this construction. Take the excepted case that fol-

lows :—"Provided always that any landlord who shall have undertaken the payment of any composition for tithes 'under Stanley's Act' shall for and during the continuance of his estate and interest in the lands be liable to the payment of such rentcharges, provided he has an estate not less than an estate of inheritance in such lands." This clause, as I understand it, declares that in the exceptional cases mentioned the owner of an estate of inheritance, even although it is not the first such estate, shall be liable to the payment of tithes rentcharge—a declaration which clearly implies that in all other cases he shall not be so liable. The area of assessment is another guide to the interest charged. The compositions were apportioned according to the occupation of the lands, each occupier's holding being separately assessed, but all the lands comprised in each first estate of inheritance or equivalent estate were to be charged with one entire rentcharge. Section 8 defines the interests that shall be deemed to be equivalent to a perpetual estate, and it is sufficient for the purposes of the present case to say that one of these interests is a tenancy under an instrument containing a covenant for the perpetual renewal thereof. Section 9 provides that in case of the forfeiture, surrender, or other determination of any estate the owner of which is liable to the payment of the rentcharge, the person having the first estate of inheritance or other equivalent estate in remainder or reversion shall thereupon become liable, provided that in case of any such devolution no more than the amount of one year's arrear shall be a charge on the lands. Section 27 is most important. After enacting that the rentcharges shall have priority over all other charges, liens, mortgages, and incumbrances affecting the lands chargeable therewith, it provides that they may be recovered by Bill in Equity, action of debt, or on the case, by civil bill, or where the person liable is in occupation, by distress. It is impossible, I think, to hold that any of these proceedings could be taken against the owner of an interest in the lands other than the owner of the estate who by the preceding sections is made liable to pay; and if this be so, the words "the lands chargeable" in this section must mean the estate chargeable.

Section 30 provides where the rentcharge is in arrear and the person liable thereto under the provisions of the Act is not in

Appeal.
1904.

I. LAND COM.
v.
ANNESLEY.
Holmes, L.J.

Appeal. occupation, a receiver may be appointed by a Court of Equity "to
 1904. receive the rents or such part of the rents of the lands charged
 I. LAND COM. with such rentcharge as shall be sufficient to pay" the same and
 v. ANNESLEY. the arrears thereof. The rents here referred to must be the rents
 Holmes, L.J. payable to the person who is liable to the rentcharge—that is the
 owner of the first estate of inheritance or its equivalent.

These are, I think, the provisions material to the incidence of tithe rentcharge; and it is apparent that their policy and effect are to attach liability to one, and only one, particular estate and its owner. The Legislature might no doubt have made one estate in the lands primarily liable, while charging the entire fee-simple and inheritance with the impost. But if this were the intention, I would expect to find some provision for enabling the owner of an interest not primarily liable, from whom payments had been enforced, to recover the amount from the person who ought to have paid. But there is nothing of the kind in the statute. On the contrary, every interest except the estate expressly made liable is protected. Take, for example, a levy by distress—the simplest mode of realising out of lands a charge to which they are subject. It can only be made for tithe rentcharge when the owner of the first estate of inheritance or its equivalent is in occupation.

Under certain circumstances mentioned in section 10, the Legislature provided that a person liable to tithe rentcharge would be entitled to recover the amount so paid from his next immediate lessee, and so downwards through successive interests. This is clearly expressed; and surely we might expect, if payment could be enforced from an estate higher than that owned by the person to whom liability attached, that a similar right would be given to the person to whom such higher estate belonged.

To sum up, the Act of 1838, as I construe it, made tithe rentcharge payable by the owner of a particular estate in the lands, who, it was assumed, would be able and not unwilling to pay it; but if it could not be recovered from him and his estate, it could not be levied from any other interest. The statute was attended with a success not usual in legislation. It put an end to the tithe war in Ireland; and since its enactment, the tithe owner has had his income exceptionally well secured. Unfortunately, however,

from circumstances not contemplated by anyone when the Act passed, Mr. Parnell's perpetual interest became in later times a *damnosa hereditas*; and to relieve himself from the burdens attaching to its ownership, he assigned it to a pauper, from whom the tithe rentcharge cannot be recovered by personal action. It would be futile for the tithe owner to have a receiver appointed over the rent payable by Anne Daly to John Giffney; for if I am right in holding that the tithe rentcharge can only be recovered from Giffney's interest in the lands, the receiver would be obliged to apply all the receipts in payment of Mr. Annesley's rent in priority to the rentcharge.

Appeal.
1904.
I. LAND COM.
v.
ANNESLEY.
Holmes, L.J.

It might be possible to argue—I do not say with what success—that Mr. Annesley having, by means of sect. 20 of Deasy's Act, gone practically into possession of Giffney's estate, he has thus made himself liable to its burdens. But the action is not framed and has not been presented in this way. Mr. Ronan tells us that the only object of the suit is to establish the proposition that the tithe rentcharge is charged on and payable out of every interest in the land. He contended that if Giffney were a solvent man, having a valuable interest in the lands, this action might still be brought against Mr. Annesley; and as the latter holds Ballysax Hills from Lord Valentia under a fee-farm grant, made pursuant to the Renewable Leaseholds Conversion Act, payment of the larger of the two tithe rentcharges could be obtained by means of a receiver over Lord Valentia's interest. Indeed the remedy, on Mr. Ronan's assumption, cannot be confined to the appointment of a receiver; for, if he is right, a personal action would lie under sect. 27 against Mr. Annesley and Lord Valentia. Doubtless this would be very convenient for the tithe owner. He would naturally look for payment to the person of largest means, from whom it could be most easily collected. Mr. Ronan said, in answer to a question from me, that if a person other than the owner of the first estate of inheritance or its equivalent were obliged to pay, he would *probably* be able to recover from the latter the sum paid, but this right is certainly not given him by any provision in the Act of 1838—a singular omission, if the framers of that statute contemplated the construction contended for by the plaintiffs. Authority upon the question under consideration is meagre and unsatisfactory.

Appel.
1904.
I. LAND COM.
v.
ANNESLEY.
Holmes, L.J.

In *Saunderson v. Stoney* (1) and *Madden v. Wilson* (2), a receiver was directed to pay tithe rentcharge in priority to head rent; but these cases were really heard *ex parte*, as in neither was the head landlord or the occupier represented. In *The Commissioners of Church Temporalities v. Harrington* (3) these old cases were cited; but the Vice-Chancellor did not think it necessary to consider them. This, as far as I am aware, is the first occasion on which the matter has been fully discussed, and our judgment depends upon the construction of the statute. For the reasons stated, I agree in the conclusion of the Master of the Rolls.

Solicitor for the appellants: *William Alexander*.

Solicitor for the respondent: *W. S. Cornwall*.

G. Y. D.

M. R.
1904.

Jan. 21.

BOURKE v. LEE.

(1901. No. 74.)

Conflicting equities—Priority—Settlement—Trust fund—Cestui que trust—Advance—Absence of notice—Blended fund.

The trustees of a marriage settlement applied to a bank for an advance to enable them to complete the purchase of certain house property, agreeing to deposit the title deeds thereof (with others) as security. The trustees received the advance from the bank, blended it with trust money in their hands, and purchased the property therewith. The bank had no notice of any trust. On the date of the advance the trustees deposited the title deeds of the purchased property with the bank. The property was subsequently sold at a loss, and the proceeds lodged in Court:—

Held, that the bank had the superior equity, and were entitled to be paid the amount of their advance with interest in priority to the claim of the *cestuis que trustent*.

FURTHER CONSIDERATION.

Messrs. Thompson and Lee (who were trustees of a marriage settlement of August 13th, 1895) borrowed a sum of £130 from

(1) 2 Ir. Eq. R. 153. (2) 6 Ir. Jur. (O. S.) 129. (3) 11 L. R. Ir. 127.

M. R.
1904.

BOURKE
v.
LEE.

the National Bank for the purpose, as they stated, of enabling them to complete the purchase of certain house property, known as 11, St. Joseph's-terrace, Phibsborough, which they were purchasing for £325, upon the terms that the title deeds thereof and of other premises should be lodged with the Bank as security for the loan with interest.

Previous to the date of the advance (on the 6th of June, 1900), Thompson and Lee deposited the title deeds of other premises, known as Riverview Cottage, with the Bank, and on the 11th of June, when the conveyance of 11, St. Joseph's-terrace, was made to them, they lodged the title deeds thereof with the Bank. The balance of the purchase-money was made up of money which Thompson and Lee had under their control, and which was trust money. The purchase of these premises was in itself a breach of trust owing to the nature of the tenure on which they were held. At the date of the advance the Bank had no notice of any trust or breach of trust, or that the money so advanced by them was being mixed up with trust money for the purpose of purchasing the property.

An action was brought to have the trusts of the settlement of 1895 carried into execution, and the premises, 11, St. Joseph's-terrace, were sold, and the proceeds lodged in Court. These premises were sold for much less than the amount paid for them. On the hearing on further consideration the National Bank applied that the amount found due to them on foot of their equitable mortgage should be declared well charged on, and should be paid to them out of, the proceeds of the sale of 11, St. Joseph's-terrace.

H. Morgan Byrne, for the *cestuis que trustent* of the settlement of 1895 :—

The beneficiaries under the settlement are entitled to priority over the Bank. Their trustees got the advance from the Bank for the purpose of completing the purchase of property impressed with a trust: they bought it with a blended fund consisting of the trust money and the money borrowed from the Bank. The title deeds of the trust property were deposited with the Bank, who

M. R. made no inquiry. The principle of *Shropshire Union Railways*
1904. *and Canal Company v. The Queen* (1) applies.

BOURKE

v.

LEE.

George Green, for the National Bank :—

The Bank are entitled to an absolutely valid charge on the proceeds of the property in respect of their advance made antecedent to the purchase of the property by the trustees of the settlement. They had no notice of any trust. They were not put upon inquiry. The possession of the title deeds confers the better equity : *In re Ffrench's Estate* (2) ; *Rice v. Rice* (3).

The Bank cannot be treated in this transaction as partners in the purchase of the property with the *cestuis que trustent*. There was not in any sense a joint investment. If the property had appreciated in value, the Bank could have had no right to claim any part of the increased value. The premises purchased only became trust property subject to a charge in their favour for the amount of the advance by them. The right the *cestuis que trustent* have as regards the proceeds of the sale of 11, St. Joseph's-terrace, arises only after the payment of £130, advanced for the purpose of purchasing it, together with interest thereon.

THE MASTER OF THE ROLLS :—

Treating this as a question arising on the facts as to the nature of the equitable rights of the Bank and the *cestuis que trustent*, the circumstances are these. Mr. Lee and Mr. Thompson went to the Bank and asked for an advance of £130, which they said they wanted to invest in the purchase of certain house property. The manager of the Bank agreed to do that on having the title deeds of the lot to be purchased and of certain other premises lodged as security for the advance. Some of the title deeds (being those of Riverview Cottage) were lodged with the Bank on 6th June, 1900, and the conveyance of number 11, St. Joseph's-terrace, was made to the two persons who were trustees of the settlement (but of course not as trustees) on the 11th June, and on the same day the rest of the deeds were lodged with the Bank. The Bank knew nothing of any trust or breach of

(1) L. R. 7 H. L. 496.

(2) 21 L. R. Ir. 283.

(3) 2 Dr. 73.

trust. There was nothing to put them on the scent of any breach of trust. All they knew was that they had a customer asking for an advance of money to buy property. It turns out, however, that the balance of the purchase-money of this lot, amounting to £195, was made up out of moneys which Lee and Thompson had in their procurement and under their control, and which was trust money, and that their embarking in the purchase of this property was in itself a breach of trust, because the tenure on which it was held was such that it was not a proper investment. Of all this the Bank knew nothing. The £130, which they advanced, was their money, and at the time of the deposit of deeds it was not the subject of any breach of trust, and could not be mixed up with the trusts of the settlement except by the wrongful act of the trustees as regards the other fund.

M. R.
1904.

BOURKE
v.
LEE.

What, then, was the position of the *cestuis que trustent* on the 11th June? They had no right to the £130 which was then advanced to their trustees by the Bank. They have traced into the lands the money of the Bank which was secured by the deposit. It never was subject to any trust till the 11th June, when it was blended with the purchase-money of 11, St. Joseph's-terrace. The position of the *cestuis que trustent* was, that they might or might not follow the trust property: but that could not be done without a decree of the Court. They now claim in effect to capture, in whole or in part, this £130, which never was theirs, and never was affected by any trust for them. Their position is not so strong nor their equity so clear as that of the Bank. The security is, in fact, a composite one, representing the settlement fund, and also the advance by the Bank, secured by the equitable mortgage by deposit. These equitable rights are distinct; and thus, as to the National Bank and their claim in respect of this £130, their equity, on the principle recognised in *Rice v. Rice* (1), must prevail.

The Bank are therefore entitled to £130 with interest.

Solicitor for the *cestuis que trustent*: C. P. O'Neill.

Solicitor for the National Bank: W. H. Dunne.

R. W. L.

M. R.
1904.

Feb. 2.

BELSHAW v. ROLLINS.

(1904. No. 1079.)

Will—Gift on condition—Option to purchase—Interest transmissible to executor of person to whom option is given.

Devise of house and farm of land to testator's wife for life, and at her decease "I desire that my brother A. shall get the entire of said house and lands, together with the plough and winnowing machine, at £8 sterling per statute acre. . . . If my brother A. will not take the land at £8 an acre, together with the buildings, &c., they are then to be sold by public auction." A. pre-deceased testator's widow, having bequeathed to his son J. "all my interest and goodwill in my deceased brother's farm, together with the plough and winnowing machine":—

Held (on the death of the widow in 1903), that there was a gift of property to A. on the condition of paying a price for it, and that this option was exercisable by his executor after his death.

ORIGINATING SUMMONS.

The questions submitted for the decision of the Court were :—
(1) What interest did Arthur Thompson take under the will of Joseph Thompson? (2) If Arthur Thompson took an option to purchase under the will, was that option validly exercised by him, or, if not, was it now exercisable by his personal representatives?

The facts and circumstances of the case on which the determination of these questions depended are stated in the judgment.

M. G. Ellison, for the plaintiffs, the executors of Joseph Thompson.

W. M. Whitaker, for legatees under the will of Joseph Thompson, Junior, the son of Arthur Thompson.

R. C. K. Wilson, for the executors of Joseph Thompson, Junior.

Thomas Harrison, for the defendant Rollins, executor of Arthur Thompson.

THE MASTER OF THE ROLLS :—

M. R.
1904.

The question is, what interest, if any, Arthur Thompson, now deceased, took under the will of Joseph Thompson.

BELSHAW
v.
ROLLINS.

The facts are stated in an affidavit of William Belshaw. He says that Joseph Thompson, late of Knockdona, in the county of Antrim, farmer, made his will dated 21st November, 1884, and died on the 5th January, 1886. Probate was granted to Thomas Maxwell, one of the executors named in the will, and he died in 1900, having appointed the plaintiffs his executors. Arthur Thompson, the legatee or devisee under the will, whose rights are in question, was a brother of the testator, and died in September of the same year as the testator, having appointed the defendant Henry Rollins executor of his will, of which probate was granted to him. The affidavit shows that proper parties are before the Court.

The question arises on the words, which are as follows :—" I give, devise, and bequeath to my wife Anne all my household furniture, stock, and chattels of every description of which I may die possessed, except my watch, plough, and winnowing-machine hereinafter-mentioned, after paying my funeral and testamentary expenses and just debts, for her sole use and benefit. I also further devise to my said wife all my dwelling-house, out-buildings, gardens, and land, containing 17 acres, &c., during her natural life, or as long only as she remains my widow ; but she must not mortgage or contract any debt whatsoever against said place, and she must keep it free from arrears of rent ; at her decease or marriage, or if she does not keep the rent paid up, I desire that my brother Arthur shall get the entire of said dwelling-house, out-buildings, garden, and land, together with the plough and winnowing-machine, at £8 sterling per statute acre ; the proceeds are to be divided in the following manner." He then directs a division among certain legatees, most of whom are now dead, and proceeds :—" If my brother Arthur will not take the lands at £8 sterling per statute acre, together with the buildings, plough, and winnowing-machine, they are then to be sold by public auction," and the proceeds were to be divided among these persons already mentioned. The widow of the testator died in

M. R.
1904.
BELSHAW
v.
ROLLINS.

1903, and therefore long survived Arthur Thompson, who was to take after her decease; and the question now arises for determination as to whether the option given to him of taking the lands on the death of the widow at £8 an acre can be exercised by his personal representatives. Before his death he made a will containing this provision:—"I give, devise, and bequeath to my son Joseph all my interest and goodwill in my deceased brother Joseph Thompson's farm, together with the plough and winnowing-machine on said place." Therefore there is no doubt that he intended to devise to his son the gift to himself contained in his brother's will, and thus in 1886 he exercised the option of taking it, so far as he could do so by his will, but that was of course a revocable instrument, and could not bind him during his lifetime.

It is to be observed, however, that, in the first place, there is in the will of Joseph Thompson a gift of the place itself, and not a mere option to take it. He says, "I desire that my brother Arthur shall get the entire of the dwelling-house, and so forth, at £8 an acre"; and, therefore, if he had not connected that gift with a condition of paying £8 an acre, these words would have vested the entire estate and interest in Arthur, so that his dying in the lifetime of the tenant for life would not affect the estate taken or prevent its passing to his executors. But it is said that the option to take it is so purely personal to Arthur that it could not be exercised by his executors after his death. Authority on the subject, strictly speaking, there is none. The only case that has been referred to is *Re Cousins* (1). That case, at first sight, bears some resemblance to the present one. It was one where a testator gave real and personal property, which included a hotel, to trustees upon trust to pay out of the rents and income annuities to his widow and sister, and during their lives and the life of the survivor to divide the residue of the rents and income equally between testator's four children, and after the decease of the survivor of the wife and sister he declared that his son Henry Cousins should have the option of purchasing the hotel at the price of £10,000, such sum to fall into the residuary personal

(1) 30 Ch. D. 203.

estate ; but if his son should decline to purchase the hotel at the price fixed within six months after the decease of the survivor of the wife and sister, the testator directed that the trustees should sell the hotel, and that the moneys arising therefrom should fall into the residuary personal estate. Just as here the devisee died very soon after the testator and in the lifetime of the tenants for life, having by his will appointed executors. On the death of the survivor of the widow and sister the question arose between the personal representatives of the son and those entitled to the residue as to whether the option to purchase could be exercised by the executors, and the matter was discussed in the Court of Appeal in very long judgments ; but I think the more closely the case is read, the more plainly will it be found that the decision turned entirely on the special facts of the case, and was so exclusively dealt with in the judgments. Lord Esher argues on the peculiarity of the business of a hotel-keeper, and particularly a hotel-keeper in the town of Cardiff. Owing to enormous expenditure of Lord Bute on the docks, Cardiff had developed into a much larger place, and the value of property had consequently increased very much, just as here (on a smaller scale) the value of the little farm has gone up by reason of the purchase of farms in the neighbourhood by the Belfast Water Commissioners.

The case of *Re Cousins* (1) does not depend on any general principle, but on its special facts. The Master of the Rolls says :—
 “ Now the first thing, to my mind, to be considered is, what was the state of things when the testator made his will, and what was the state of things with which he was about to deal ? He was an innkeeper in Cardiff, and he had two hotels in his possession at the same time, and, as far as I can see, was working them together. It is the commonest thing in the world in a large town like Cardiff. But, I suppose, as he grew older, he got tired of working one himself, and perhaps one by a manager, and therefore he had let one of the hotels. That must be taken into consideration. Now, what is the natural desire of a hotel-keeper in a town of moderate size ? It is to hold as many of the hotels in the town as he can, or, all events, to have a personal influence with regard to as many as he can. For

M. R.
1904.

BELSHAW
v.
ROLLINS.

M. R.
1901.
BELSHAW
v.
ROLLINS.

what reason? For a very good business reason, namely, that if his first hotel has succeeded to such an extent that he has a large number of customers who will follow him, he is immediately anxious, not merely to have some influence with another hotel, but to work it, and to be the person who is to have the profit, because he can take his customers with him. That is the first result that occurs to my mind, bringing a knowledge of business to bear upon it: that is the first desire of the hotel-keeper if it can be done. But another point is to be considered: if he cannot take his customers with him, his next fear is that, if another adverse person sets up another hotel, not only will the latter take his own customers with him, but also that he will take the hotel-keeper's customers from him. That is a very material thing in this sort of business. Therefore, if he cannot carry on the other hotel personally, he likes to have a power over it—a power to be exercised by him personally. He cares no more for his executors than he cares for anyone else. He wants to have the power himself for the purpose of carrying on his business whilst he is alive, and, therefore, if he cannot himself carry on the business, the next thing which he would like would be to be the owner or the landlord of the other hotel, so that he might take care that the person who goes into that hotel shall be bound not to interfere with him, because it would be to the interest of that person not to interfere with his landlord in the other hotel.” And he says:—“Now, what is the first thing that would be in the testator's mind if he cared about his son? Why, that his son should have the same advantages as himself; that the son should either have a power of working the two hotels together, or that his son should have such an interest in both hotels that one could not be set up as a rival to the other. That is the state of things with which the testator has to deal when he is about to make his will.” Then he comes to the terms of the will. And he says:—“Now, how is it that the dispute has arisen? It has arisen by an accident. Cardiff is a wonderful place, as everybody who has been there knows; and Cardiff, for some reason or other, either by reason of the extension of the docks and other works, or by the careful superintendence and personal interest of its great proprietor, Lord Bute, has jumped up into a town double or treble the size that it was; not according to

its natural growth, but according to a sudden artificial increase; and therefore this hotel, which probably was worth £10,000, has jumped up to a largely increased value, and immediately there is a lawsuit, and with the admirable ingenuity of lawyers of every description they try to make out of a man's will what he did not say, and what he never thought of. I am of opinion that this was a mere personal option." Cotton, L.J., follows up very much the same line of reasoning, and considers that the case is not ruled by *Buckland v. Papillon* (1), where there was an option to take a lease which was not exercised by the donee, and it was held to be vested in his assignees in bankruptcy. All the elaborate reasoning or argument of the learned Judges might have been spared if they meant to decide a general principle, and not one dependent upon special facts; and it was the special facts that led their Lordships to hold that the right conferred was purely personal.

M. R.
1904.
BELSHAW
v.
ROLLINS.

The case then turns, as I have said, so exclusively on its particular facts that even if its circumstances more nearly resembled those of the present case than they do, it would be no authority on the question to be determined; but there is besides the special fact of the peculiarity of a hotel-keeper's business, assuming the view of the Court of Appeal to be correct, this difference between the two cases, that in *Cousins' Case* (2) there was nothing given at all except an option to purchase, while here there is a positive devise or bequest of the property of the farm, &c., connected with the condition of paying £8 an acre, and therefore there is a radical and substantial distinction between the two cases. A gift of property on condition of paying a price for it is different from a mere option to purchase it. The condition of payment is a condition subsequent, that is, subsequent to its vesting, because Arthur Thompson could not of course be called upon to pay during the lifetime of the tenant for life, as the intention was that the choice was to be exercised when the estate fell in; but all the same, till then the property was vested in him subject to that condition. The element of personal need or personal convenience (on which *Re Cousins* (2) depended) is absent. There is nothing on principle or authority to prevent the personal representatives of Arthur

(1) L. R. 1 Eq. 477.

(2) 30 Ch. D. 203.

M. R. Thompson taking the gift which was intended for him subject
 1904. to the performance of the condition attached to it—a condition
BELSHAW which he was willing to perform if it were possible for him to
v.
ROLLINS. do so.

Solicitor for the executors of Joseph Thompson: *M'Connell.*

Solicitor for the legatees of Joseph Thompson, Junior :
Wilson.

Solicitor for the executors of Joseph Thompson, Junior :
Wilkins.

Solicitor for the executor of Arthur Thompson: *Leachman.*

R. W. L.

M. R.

1904.

March 14, 15.

TRENCH *v.* WALLACE.

(1904. No. 234.)

Landlord and tenant—Contract—Lease for lives renewable for ever—Lessee bound to accept renewal—Implied covenant—Limited owner—Remainderman—Agreement fixing fair rent—Statutory powers—Land Law Acts—Redemption of Rent Act—Vendor and purchaser.

In a lease for lives renewable for ever, the *habendum* was to the lessee, his heirs and assigns, for the lives therein, and any others to be added, in pursuance of the covenant for perpetual renewal therein contained. There was a declaration that the lessee was to have a perpetual interest:—

Held, that there was an implied covenant on the part of the lessee to accept renewals.

In 1885 the last life in the lease dropped. In 1892 a fair rent was fixed by statutory agreement between the tenant for life of the reversion and the owner of the lease, reducing the rent considerably. This was not done under the Redemption of Rent Act, but the letting was treated as an ordinary tenancy from year to year.

The tenant put up his interest for sale by auction, describing it as a judicial tenancy at the reduced rent:—

Held (on a vendor and purchaser summons), that the landlord, as tenant for life, had no power to waive his right to compel the tenant to accept renewal, and that the agreement reducing the rent was not binding on those entitled in remainder.

SUMMONS under the Vendor and Purchaser Act, 1874.

M. R.

1904.

TRENCH
v.
WALLACE.

By lease of 14th April, 1801, J. W. Atkinson demised to William Trench part of the lands of Cangort Park, containing about 180 acres, to hold to said William Trench, his heirs and assigns, for the lives of three *cestuis que vies* therein named, and for the lives or life to be thereafter added, in pursuance of the covenant for perpetual renewal therein contained, subject to the rent of £332 sterling. And the lessor covenanted that upon the said William Trench, his heirs and assigns, first paying to the lessor, his heirs and assigns, one peppercorn as a fine (if demanded), that he or they would from time to time renew the term of the demise from time to time for ever, for "the several life or lives so to be nominated in the place and stead of the life and lives of the person or persons so successively happening to die, as aforesaid." And it was declared that it was the true intent and meaning of the parties that the said William Trench, his heirs and assigns, on the performance of the clauses, provisoes, and conditions therein contained, should have a perpetual interest in the demised premises.

The lease of 1801 was renewed in 1810 and 1826, and again by deed dated 3rd September, 1830. The last life in the lease of 1830 dropped in 1885, since when no renewal was taken out. At that date Colonel Guy Atkinson was owner in fee of the property, subject to the lease, and the Rev. William Robert Trench was owner in possession, as tenant for life of the lessee's interest. In 1887 an agreement was come to between these parties that the rent payable should be reduced to £300 till 1890, when the tenant was to have the same right of renewal, or of claiming a fee-farm grant, on the old terms.

On 28th April, 1892, an agreement and declaration of 5th January, 1892, under the hands of Mrs. Atkinson, widow (the tenant for life of the reversion expectant on the lease), as landlord, and the Rev. William Robert Trench, as tenant, was filed in the Court of the Irish Land Commission, pursuant to the provisions of section 8, sub-section 6, of the Land Act of 1881, by which £220 was agreed and declared to be the fair rent of the holding of Cangort Park.

The tenant's interest in the house and lands of Cangort Park

M. R.
1904.
TRENCH
v.
WALLACE.

were put up for sale by auction, and by contract in writing, dated 26th November, 1903, the defendant agreed to purchase the premises from the Rev. William Robert Trench at the price of £3000, described as "held under a judicial tenancy, under statutory agreement dated 5th January, 1892, at the yearly rent of £220."

In his requisitions on title the purchaser objected that the agreement of 1892 was inoperative to determine the tenancy under the lease for lives renewable for ever, and that therefore the lands were not held under a judicial tenancy, and that the agreement was invalid, and that the lands were not held at the rent of £220.

On 1st March, 1904, a summons was issued on behalf of the Rev. William Robert Trench, as vendor, against the defendant, as purchaser, which asked (among other things) that it might be declared that the originating agreement and declaration above mentioned was valid and operative to create in the lands described therein a statutory tenancy, at the yearly judicial rent of £220, and that such statutory tenancy was binding on the inheritance of the landlord's interest in those lands.

H. Cole Bowen, for the vendor :—

The only clauses in the lease of 1801 from which a covenant on the lessee's part to accept renewals can be implied are the *habendum* ("and for the several life or lives so to be nominated in the place and stead of the person or persons so successively happening to die") and the declaration of intention that the lessee should have a perpetual interest. But these clauses alone are not sufficient to imply such an obligation on the part of the lessee: *Shinnick v. Beresford* (1). There is not in this case any question of a *toties quoties* covenant for renewal, as in *Curry v. Stanley* (2), *Pilson v. Spratt* (3), and *Foley v. Roland* (4). In *Ward v. M'Roberts* (5) the lessee became liable for an additional fine of £50 if he failed to nominate the new life within a limited period.

But assuming that the lessee was bound, if so required, to accept a renewal from the lessor, the statutory agreement and declaration

(1) *M'Devitt's Land Cases*, 516.

(2) *H. & J.* 487.

(3) 25 L. R. Ir. 5.

(4) [1898] 1 I. R. 311.

(5) 25 L. R. Ir. 224.

of 1892 are binding on the inheritance of the lessor's estate. The vendor's interest at the date of the filing of that agreement was at law (and apart from any equity arising under the Tenantry Act) a mere tenancy from year to year, and the lessee became, on the death of the last *cestui que vie* in 1885, entitled to be deemed the tenant of a present ordinary tenancy (Land Law Act, 1881, sect. 21). In the case of any such tenancy a fair rent may be fixed by agreement or declaration, under sect. 8, sub-sect. 6, of the same Act. And by virtue of sect. 23 a landlord, being a limited owner (as was Mrs. Atkinson in this case), may (with certain exceptions) exercise under the foregoing provisions of the Act any powers which an absolute owner might have exercised. In point of strict law, therefore, the procedure in the present case has been regular, and the fair rent fixed in 1892 is binding on the inheritance of the reversioner. In equity, however, the interest was no doubt a perpetuity. But the parties entitled in remainder could not invoke the interference of a Court of Equity, unless they could show that they had suffered some substantial injury through the exercise by the tenant for life of her legal powers. And the effect of the Redemption of Rent Act, 1891, was to render valueless, for all practical purposes, the lessor's equitable right to compel the lessee to accept a renewal. The only result of enforcing that equity would be that (unless the landlord had agreed to the redemption of the rent) a fair rent would have been fixed under the 1st section of the Act of 1891, instead of under the 8th section of the Act of 1881. And there is no suggestion here of any such special circumstances as would have rendered the redemption of the rent more beneficial to the inheritance than the fixing of a fair rent at a reduced rate.

H. R. Poole, for the purchaser :—

On the construction of the lease of 1801 there is an implied covenant on the part of the lessee to accept renewals. The authorities cited on the subject are all in my favour, except the decision of O'Hagan, J. The *habendum* shows that a covenant to accept renewals must be implied. The declaration of intention, generally so much relied on, is also present.

[THE MASTER OF THE ROLLS: I am of opinion that there

M. R.
1904.
TRENCH
v.
WALLACE.

M. R. was a perpetual interest under the terms of the lease, and that the
 1904. lessee therein was bound to accept renewals.]

TRENCH
 v.
 WALLACE. That being so, Mr. Bowen cannot rely on the 21st section of the Land Act of 1881. Then as to the agreement of 1892. The provisions of the Redemption of Rent Act, and of sect. 17 of the Land Act, 1896, have not been complied with. Section 1 of the Land Act, 1887, shows that for the purpose of that statute a tenant does not acquire the *status* of a present tenant till the Court has made an order to that effect: *Smyth v. Moore* (1); *Cherry's Land Law Acts*, p. 393. *A fortiori* in cases coming within the Redemption of Rent Act the *status* of a present tenant is not acquired until the lessor has refused his consent to redemption and the Court has adjudicated on the tenant's claim to have a fair rent fixed. *McCarthy v. Bennett* (2) is an express decision that unless this agreement can be brought within sect. 17 of the Act of 1896, it is not binding on the remainderman. The purchaser may thus be exposed to an action by the remainderman for the full rent reserved by the lease of 1830 after the death of the tenant for life, and the Court will not hold him bound to complete in such a case. As regards sect. 23 of the Act of 1881, relied on by the vendor's counsel, that only enables a landlord who is a limited owner to fix a fair rent by agreement where a present tenancy exists. The section has no application where a present tenancy does not exist.

March 15.

THE MASTER OF THE ROLLS :—

The main question which remains to be decided is as to the power of a tenant for life to bind the inheritance. The original lease for lives renewable for ever expired in 1885. The legal position of the lessee was then that of a tenant from year to year. His equitable position was something different. He had got this property, which was essentially distinct from a tenancy from year to year, and his right to renewal, though gone at law, might be preserved in equity. But if he was a tenant from year to year there was a present tenancy in the holding, and the landlord, even if he were only tenant for life, would have come within section 23

(1) 32 L. R. Ir. 129.

(2) [1899] 2 I. R. 622.

of the Act of 1881, and would have been in the position of being able to fix a fair rent by agreement.

In this case it is objected by the purchaser that the agreement of 1892 fixing the rent does not bind the inheritance. Mr. Bowen pressed it to the fullest extent that the agreement of 1892 bound all the legal interest, that the tenant had no right to renewal, and if he had no right to renewal, then all parties are bound, because section 23 of the Land Act of 1881 allows a landlord who is a limited owner to exercise the same power as an absolute owner. But the real difficulty is that the old lease was not gone. It was a subsisting lease; and apart from the statutory power the person who was tenant for life of the lessor's interest had no power to bind anyone entitled in remainder. The tenant for life of the reversion in dealing with the legal interest was entirely within his powers, but the question is whether he had power to deal with the equitable interest. There was a lease for lives renewable for ever, which was a valid, binding lease, capable of assignment, which is descendible, which could be devised or dealt with as the owner pleased. It has not been dealt with by the tenant for life of the reversion unless he had a power to do so transcending what he could do in the case of a tenant from year to year. Those entitled in remainder might say after an interval of fifty years:—"You have purported by arrangement to bind the reversion; you have filed an agreement, the effect of which, if legal, is to reduce the rent of the lands formerly held under the lease. That may be good as against yourself, but it cannot bind the inheritance unless you can show that you had statutory authority to do it. There is nothing on the face of this agreement to effect a valid, equitable surrender of that interest to the reversion expectant on which I am owner in remainder, and I am entitled to the rent reserved by the renewable lease of 1830." And the purchaser says:—"I may be subject hereafter to a claim for this rent, and you must show me that this agreement reducing the rent was a valid transaction under the power given to a tenant for life enabling you to do this."

Mr. Bowen, in his very clear and copious argument (I mean copious in the sense that he referred to all the sections bearing on the matter), did not contend that prior to the Redemption of Rent

M. R.

1904.

TRENCH
v.
WALLACE.

M. R.
1904
TRENCH
v.
WALLACE.

Act, 1891, there was any power that, in this particular transaction, could have authorized the tenant for life to bind those entitled in remainder; but he says that the Act of 1891 places the tenant for life in a different position, or rather expands his authority, and shows that he had power to do this very thing, because he had such control over the matter that he was practically *dominus* of the whole. Section 1 of the Act of 1891 provides that "where a person in *bona fide* occupation of a holding to which part 1 of the Land Law (Ireland) Act, 1881, applies, is a lessee under a lease to which the provisions of section 1 or section 3 of the Land Law (Ireland) Act, 1887, do not apply by reason of the period of its expiration, or by reason of its being renewable or perpetual, or is a grantee under a fee-farm grant, and such person holds his land at a rent which the Land Commission considers, having regard to the renewal fines (if any), and all the circumstances of the case, holding, and district, to be a full agricultural rent, such occupier shall, subject as hereinafter mentioned, be entitled to apply in the prescribed manner to redeem his rent, whereupon if the lessor or grantor, as the case may be, signifies his consent within the prescribed time, and in the prescribed manner, including consent (where such consent is by law required) to such sum being retained as guarantee deposit as the Land Commission may think necessary, then such redemption shall be effected by payment, subject to the Rules of the Land Commission, of such capital sum as may be agreed upon, or as in case of difference may be determined by the Land Commission (regard being had to the adequacy of the security), in like manner as if it were a head rent redeemed under the provisions of section 16 of the Land Law (Ireland) Act, 1887." The meaning is that it would have been open for the tenant for life of the lessee's interest in this case to have applied to the Land Commission for the purpose of redeeming the rent reserved by the lease. Then "such consent by the lessor or grantor shall have the same effect as the lodgment of an agreement to purchase under the Land Purchase Acts, and, except as herein otherwise provided, all subsequent proceedings shall be carried on and with the like consequences as upon such an agreement: provided that if the lessor or grantor, as the case may be, does not consent in manner prescribed by the Land Commission to such redemption, or causes,

in the opinion of the Land Commission, unreasonable delay to the making of such redemption, the redemption shall not be made, but the lessee or grantee, as the case may be, shall be deemed to have made the prescribed application under section 1 of the said Act of 1887, and shall be held to be a tenant of a present tenancy in manner and subject to the conditions and right of resumption mentioned in section 21 of the said Act of 1881, as modified by section 1 of the said Act of 1887, and his holding shall be subject to the provisions of the said Acts with regard to present tenancies."

M. R.
1904.

TRENCH
v.
WALLACE.

That involves the right, in cases to which the enactment applies, to fix a fair rent, and to do so by agreement, or without agreement; and Mr. Bowen says that it gives such enormous power to a tenant for life that he must, in equity, be considered to have power to bind the whole estate, apart from the exact provisions to be found in the words used, and that the persons entitled in remainder in this case could never dispute the fact that the tenant for life had power to fix the rent by the agreement of 1892. I am unable to agree with Mr. Bowen's argument. I think that the Redemption of Rent Act does confer extensive powers on limited owners, but they have not been invoked by the parties in this case, because there has not been any application to redeem the rent, there has been no refusal, and as there has been no refusal the last part of the section cannot take effect. It is a new right, in respect of which a new remedy is conferred; and such a remedy is, on principle, exclusive. But Mr. Bowen says that though technically this has not been done, yet the very enactment itself involves a recognition of some inherent power in a tenant for life, greater than any given by the previous Act, and that therefore the tenant for life must be assumed to have power to do what is substantially the same thing by filing an agreement providing for the reduction of the rent. That cannot be the meaning of the Legislature, because the Act does not say that the tenant for life shall have the same powers, for all intents and purposes, as an absolute owner within the meaning of the Land Law (Ireland) Act, 1881. There is a special limited power alone conferred. It is not identical with a power to fix a fair rent. The power of having a fair rent fixed is different from

M. R.
1904.
TRENCH
v.
WALLACE.

the power of fixing a fair rent by agreement; and at any rate the purchaser in the present case is asked to take his chance of a construction of the section which goes beyond the words used, and which those words, in my opinion, are not capable of bearing. This section of the Redemption of Rent Act does not refer to sham applications for redemption, but to real applications by tenants to redeem, and involves this, that the tenant means to redeem. There is a special and exceptional power given, and, if it is really and *bona fide* exercised, it enables a tenant for life to bind the inheritance, and thus, in this case, if proper steps had been taken and the parties had agreed to the amount of rent payable, the purchaser of the tenant's interest would have been bound. But no such case exists here.

I am therefore unable to say that the Redemption of Rent Act confers on a tenant for life the powers of an absolute owner for all purposes to bind the inheritance.

For these reasons the vendor has not shown title which the purchaser is bound to accept, and therefore the requisitions have not been answered.

Solicitors for the vendor : *Collis & Ward.*

Solicitor for the purchaser : *Bridge.*

R. W. L.

BROWNE *v.* BROWNE (1).*Appeal.*
1903.

Executor and administrator—Administration—Insolvent estate—Secured creditor holding security from third party—Proof by—Payment from third party—Reduction of proof—Right to payment, provided creditor does not receive more than 20s. in the £.

Oct. 30.
Nov. 2.
Dec. 9.

J. B., by his will, dated the 6th January, 1870, left all his real and personal estate to his wife for life, and he left several legacies to his children, payable after the death of his wife, which he charged upon his real and chattel real estates, and, subject thereto, he left the residue of his real and personal estates to his wife. The testator died on the 27th February, 1870. After his death his widow went into possession, and some of the legatees applied to her for payment of their legacies during her lifetime, and she agreed to the proposal. The money was borrowed from an Insurance Company, the repayment being secured by three deeds of mortgage, by which the legatees so paid mortgaged their legacies to the Insurance Company, and covenanted for payment of the amount advanced. Mrs. B. also covenanted with the Insurance Company for payment, and charged her life estate and the residue with the repayment of the amount advanced. The Company advanced for payment of the legacies the sum of £5400. Mrs. B. died on the 16th July, 1891, and her estate proved insolvent, but the interest on the mortgages had been paid down to her death. In the proceedings to administer her assets the Insurance Company proved for £5400, on foot of the covenants contained in the mortgage deeds, without valuing the other securities which they held. Subsequently payments were made to them from the proceeds of the sale of the lands in the Land Judge's Court, where the lands were sold, and by the Receiver out of the rents and profits after the death of Mrs. B., which reduced the amount due to them to £3138 3s. 7d. On the final allocation of the funds:—

Held (affirming the decision of Chatterton, V.-C.), that the Insurance Company were entitled to receive a dividend on the full amount of their debt as proved, without deducting therefrom the payments received, provided that they did not receive more than 20s. in the £.

APPEAL from an order of the Vice-Chancellor dated the 27th April, 1903, made on an application for allocation of the funds in Court. The proceedings were instituted by summons to ad-

(1) Before LORD ASHBORNE, C., and FITZ GIBBON, WALKER, and HOLMES, L.JJ.

Appeal.
1903.

BROWNE
v.
BROWNE.

minister the assets of Julia Browne by the executor against two of the legatees in her will, and on the posting for creditors the North British and Mercantile Insurance Company on the 10th June, 1892, sent in claims, amounting to £5900, on foot of covenants in four deeds of mortgage executed by Mrs. Browne. These claims were admitted to proof. The total amount of debts proved amounted to £8219 7s. 9d., and the estate was insolvent.

James Browne, the husband of the testatrix, by his will dated the 6th January, 1870, left all his property to his wife for her life, and he bequeathed to their children the following legacies, payable on the death of his wife, which he charged on his real and chattel real estates: to Jane Browne, £1800; to Catherine Browne, £1500; to James Browne, £1500; to Andrew Browne, £1100; and to Christopher, Robert, Michael, and Robert, £1000 each. The testator bequeathed the residue of his property, real and personal, to his wife. The testator died on the 27th February, 1870, and his widow went into possession of his property.

Some of the legatees applied to their mother, Julia Browne, for payment of their legacies during her lifetime, and she agreed to pay them, but to enable her to make these payments the amount was borrowed from the Scottish Provincial Insurance Company, the repayment being secured by the following mortgages:—In February, 1877, Catherine Browne and Robert Browne were paid their legacies of £1500 and £1000 respectively; and by indenture dated the 8th February, 1877, Catherine Browne and Robert Browne mortgaged their legacies of £1500 and £1000, respectively, to the Insurance Company, and covenanted to repay the amounts, and Julia Browne covenanted with the Company to repay the sum of £2600, and charged her life estate and the residue with the repayment.

In June, 1877, James Browne was paid his £1500, and Andrew Browne (who had already been paid £700 on foot of his legacy) was paid £100; and by indenture dated the 5th June, 1877, James Browne mortgaged to the Insurance Company his legacy of £1500, and covenanted for payment of the amount; Andrew Browne mortgaged his legacy of £1100 to secure the £100 so paid, and gave a similar covenant; and Julia Browne covenanted to

pay the sum of £1600 so advanced, and she mortgaged her life estate and the residue to secure the amount.

In July, 1878, Edward Browne was paid his legacy of £1000, and Andrew Browne was paid £300 (the balance due on his legacy of £1100), and, by indenture dated the 6th July, 1878, Edward Browne mortgaged to the Insurance Company his legacy for £1000, and covenanted for payment of the amount; Andrew Browne mortgaged his legacy of £1100 to secure the £300 so paid, and gave a similar covenant; and Julia Browne covenanted to pay the sum of £1300 so advanced, and she mortgaged her life estate and the residue to secure the amount.

There was another mortgage for £500, dated the 14th December, 1877, executed by Julia Browne to the Insurance Company on the Company paying off a mortgage created by James Browne (the original testator) to a Miss Blake, but the amount of this mortgage was subsequently paid off, and no question arose with regard to it, and the amount was deducted from the £5900 originally due, leaving £5400 due.

The three sums of £2500, £1600, and £1300, secured by the three first-mentioned mortgages, made up the sum of £5400, the amount of the Insurance Company's proof.

At the time of proving their debt on foot of the covenants contained in the deeds of mortgage, the Insurance Company did not make any valuation of the other securities which they held for the repayment of their debt.

In 1889 the business of the Scottish Provincial Insurance Company was transferred to the North British and Mercantile Insurance Company by 52 & 53 Vict. c. cxlii; the mortgages due to the former Company were transferred to the latter.

Julia Browne died on the 16th July, 1891, and her will was proved by Edward Browne, the executor. The interest on the mortgages had been paid by Mrs. Browne down to the date of her death.

The interest having subsequently fallen into arrear, on the 28th June, 1894, a Receivership deed was executed, whereby a Receiver was appointed to collect the rents, and apply them for the purpose of keeping down the interest on the mortgages and charges.

The Company had received out of allocations in the present suit the following sums:—In respect of the covenants in the three

Appeal.
1903.

BROWNE
v.
BROWNE.

Appeal.
1903.

BROWNE
v.

BROWNE.

mortgages, £751 0s. 1*d.*; out of of legacies on James Browne's estate, which were assigned to them, £2894 13s. 10*d.*; from the Receiver, for rents of the lands subsequent to the death of Julia Browne, £1353 3s. 6*d.* After giving credit for these payments there remained due to the Insurance Company, at the date of the final allocation, the sum of £3138 3s. 7*d.* for principal.

The estate of James Browne had been sold in the Land Judge's Court, and the residue of the purchase-money derived from the sale was insufficient to pay the amount of the legacies. Julia Browne had paid out of her own money the legacy of £1800 to Jane Browne and £700 to Andrew (portion of his legacy of £1100), and these two legacies were assigned to her by deed in 1887. A sum of £2117 2s. 11*d.* was paid by the trustees of the will of James Browne to the credit of the present cause and matter, being the amount of money available to satisfy the aforesaid sum of £2500 so paid by Mrs. Browne.

On the matter coming on for allocation the plaintiff applied to the Court for a direction that the Insurance Company were only entitled to receive a dividend upon the amount actually due to them after giving credit for all sums paid to them on account of their debt. On the 31st July, 1903, the Vice-Chancellor refused the application, and held that the Insurance Company were entitled to claim dividend on the full amount of their debt as proved against the estate of James Browne, and also against the estate of Mrs. Browne, provided that they did not receive more than 20s. in the £ on the whole amount due to them. From that order the plaintiff appealed.

Wylie, K.C., and *R. Carroll*, for the appellant:—

We submit two propositions—

1. Inasmuch as the property subject to the mortgages would, if the mortgages were paid off, become assets of Mrs. Browne, the secured creditor is not entitled both to the value of the security and to prove for the full amount of his debt.

2. The money which the Insurance Company have received from the sale of the lands should be applied, so that the Insurance Company should reduce *pro tanto* the amount of their proof for further dividend.

Mrs. Browne's estate being insolvent, the rules of bankruptcy law apply: Judicature Act, section 28, sub-section 1; and the rule of bankruptcy is that a secured creditor cannot both prove against a bankrupt's estate and retain a security which, if given up, would go to augment the estate against which he proves. But if the security were given by a stranger, it would not augment the bankrupt's estate: *Re Turner*; *Ex parte West Riding Union Banking Company* (1). If a creditor holds bills on which the bankrupt and other persons are liable as collateral security for the debt, and he proves for his whole debt, and one of the bills is afterwards paid, his proof will be reduced by the amount of such bill: *Ex parte Brunskill* (2); *Ex parte Burn* (3); *Ex parte Barratt* (4); *Re Barned's Banking Company* (5); *Commercial Bank of Australia v. Wilson* (6).

Appeal.
1903.

BROWNE
v.
BROWNE.

O'Connor, K.C., for the North British and Mercantile Insurance Company:—

A secured creditor is not bound to value a security given to him by a third party. If, after he has proved his debt, he receives a payment or a dividend from a third party, that will not be deducted from the amount of his proof, but he will be entitled to receive a dividend on the full amount of his debt as proved, provided he does not get more than 20s. in the £: *Ex parte Rushforth* (7); *Re Turner*, *Ex parte West Riding Union Banking Company* (1). In *Ex parte Barratt* (4) and *Re Barned's Banking Company* (5), the securities were from the bankrupt himself.

LORD ASHBOURNE, C.:—

Dec. 9.

This is an appeal from an order of the Vice-Chancellor made in a suit brought to administer the estate of Mrs. Julia Browne. Among the creditors who put in a claim was the North British and Mercantile Insurance Company, who sent in a claim for £5900. That was founded on advances made by them to Mrs. Browne, to enable her to pay in advance legacies bequeathed by the will of her husband to their children, who were entitled to be paid on her death. This sum of money was secured to

(1) 19 Ch. D. 105.

(2) 2 M. & A. 220.

(3) 2 Rose, 55.

(4) 1 Gl. & Jam. 327.

(5) L. R. 19 Eq. 1.

(6) [1893] A. C. 181.

(7) 10 Ves. 416.

Appeal. the Insurance Company by assignment of the legacies, then by
 1903. a mortgage of the property to which Mrs. Browne was entitled
 BROWNE under the will, and on which the legacies were charged, by the
 v. personal covenant of Mrs. Browne, and also by the covenants of
 BROWNE. the legatees. The Company had thus different securities for the
 Lord payment of their debt, each of them independent of the others.
 Ashbourne, C. After the proof of their debt, the Company received payment of
 £2400 out of the proceeds of the sale of the property upon which
 the legacies were charged. Mr. Wylie, who argued his case with
 great ability, contended that the Court was bound to reduce the
 proof of the Insurance Company by the amount so received, and
 allow the proof to stand for the balance of their debt, as they had
 proved without having valued the other securities.

The case came before the Vice-Chancellor on a final allocation, and he was asked to declare that the Insurance Company on the proposed allocation are only entitled to receive a dividend upon the amount actually due to them, after giving credit for all sums paid to them on account of their debt. The Vice-Chancellor, after having the case fully argued before him, decided that the Insurance Company were entitled to prove for the full amount of their debt against the estate of James Browne, and also against the estate of the deceased in this matter, provided that they should not be entitled to receive more than 20s. in the £ on the whole of the amount due to them. That decision rests on the broad ground that the Insurance Company are entitled to receive dividends upon the full amount of their debt as proved, subject to this, that they are not to get more than 20s. in the £ on their debt. From that decision the appeal has been taken, and the case has been fully argued before us. In my opinion the decision of the Vice-Chancellor is right, and should be affirmed, and I satisfy myself with stating the conclusion at which I have arrived, because I have had an opportunity of reading the judgment which Holmes, L.J., has written in this case, in the reasoning of which I entirely concur.

FITZ GIBBON, L.J. :—

I concur. There were two distinct debts, and two distinct debtors, and two securities against which the proofs were made ;

first, the legacies; and secondly, the property on which they were charged. The fallacy in Mr. Wylie's argument was the assumption that the legacies had been paid. It would be impossible to give effect to the deed, if the legacies were regarded as paid off. If the security had been foreclosed, or if the parties had been obliged to redeem, they would have had to redeem the legacies, and the estate on which they were charged, as distinct items of mortgaged property. Having two estates and two debtors to look to, the secured creditor was entitled to prove for the whole amount against each, and after one of the charged estates had been made available for the payment of his debt, so far as it would go, the creditor, not having been paid in full, was not bound to reduce the amount of his proof against the other, unless and until his whole debt was paid. The rule of bankruptcy did not bind him to give credit to his second debtor, or against his second security, so long as he did not get more than 20s. in the £.

Appeal.
1903.
BROWNE
v.
BROWNE.
Fitz Gibbon,
L.J.

WALKER, L.J.—

It was first contended in this case that the Insurance Company was bound to value its security before it proved. That point does not arise upon the appeal, but as it enters into the real question it is well to deal with it. The collateral securities which the Insurance Company held were securities upon the estates of other persons, viz. on the legacies charged on the lands. It is quite plain that the mortgage which the Insurance Company took of these legacies preserved, and was intended to preserve, these legacies as securities in their priority against the estate of the owner of the estate, and no intelligent conveyancer would have framed the deed in any other way, or adopted only the security of the owner merging the legacies in her ownership. If that is so, it is plain that they were not bound to value the security before they proved.

Being entitled then to prove for the whole amount, are they bound to reduce the proof in respect of moneys which they have since received? The moneys they received were under the trusts of a Receivership deed executed by all the parties after the death of Julia Browne, and were payments on account of the legacies since her death, on which event the legacies became payable. None of the legacies has been paid in full. Under these circumstances

Appeal. the Company are entitled to prove and receive dividends on the
 1903. full amount of the proof, subject to not receiving more than 20s. in
 BROWNE the £.

v.
 BROWNE. I may refer in support of this to the cases of *Ex parte Wild-*
 Walker, L.J. *man* (1); *Ex parte Rushforth* (2); *Ex parte Royal Bank of Scot-*
land (3); *Ex parte Cama* (4). With regard to the case of *The*
Commercial Bank of Australia v. Wilson (5), which was pressed
 on us by Mr. Wylie, the only point there was, whether payment,
 or appropriation equal to payment, had taken place before proof.

In cases where the rule in *Ex parte Waring* (6) applies, the
 application of the security is deemed by force of the rule to
 have been made when the bankruptcy or insolvency takes place,
 and therefore before proof.

HOLMES, L.J. :—

This suit has been brought for the administration of the real
 and personal estate of Julia Anne Browne, whose assets at the time
 of her death were insufficient to meet the debts and liabilities pay-
 able thereout. In reply to the posting for creditors, the North
 British and Mercantile Insurance Company sent in claims, which
 were admitted without proof, amounting in all to £5900, on
 covenants contained in four deeds of mortgage by which the
 deceased had covenanted to repay the amounts secured thereby:
 There is now no controversy as to one of these deeds—a mortgage
 for £500—which has been paid in full, with the admitted result
 that the claims of the Company must be reduced by that amount.

The question for decision arises on the other mortgages, which
 were executed under the following circumstances. Mrs. Browne,
 the deceased, became entitled under her husband's will to his real
 and personal estate, subject to certain legacies payable on her
 death to their children. Some of the legatees, being anxious to
 raise the legacies in her lifetime, asked her to join with them
 in obtaining the amount thereof from the Insurance Company;
 and this request having been acceded to, the advances were made
 and secured—(1) by an assignment by the legatees of their

(1) 1 Atk. 109.

(2) 10 Ves. 416.

(3) 19 Ves. 309.

(4) L. R. 9 Ch. 686.

(5) [1893] A. C. 181.

(6) 19 Ves. 344.

legacies; (2) by a mortgage from Mrs. Browne of the property on which the legacies were charged; and (3) by her personal covenant for repayment. There were also covenants for repayment from at least some of the legatees; but these covenants were afterwards released, and I attach no importance to them.

Appeal.
1903.

BROWNE
v.
BROWNE.

Holmes, L.J.

The material matter is, that two separate and distinct properties belonging to different owners were mortgaged—the legacies, and the premises on which the legacies were charged. The full amount of these mortgages was due when the Company sent in the claims, and there was no valuation of securities when the proof was allowed. Subsequently the lands on which the legacies were charged were sold in the Land Judge's Court; and the Insurance Company has been paid on account of the legacies out of the proceeds of sale £2894. The Company has also received in allocation in this suit on account of the three mortgages £751 in addition to a sum of £1353 from a Receiver, who, under a deed executed after the death of Mrs. Browne, collected the rents and profits of the lands previous to the sale. As regards this last-mentioned sum, a question might have arisen if any portion of it represented rents that accrued in the lifetime of Mrs. Browne; but as I understand it to be admitted that the whole of it was paid out of rents becoming due after her death, and that it was insufficient to keep down the interest at 4 per cent. then accruing on the legacies, it may be dismissed from consideration. Such was the position of affairs when the order appealed from was made. The occasion of that order was an application by the plaintiff for a further, and I believe the final, allocation of the funds in Court to the credit of this suit, and for a declaration that in such allocation the Insurance Company is only entitled to receive a dividend upon the amount actually due to them after giving credit for all sums heretofore paid on account of its debt. This declaration was refused by the Vice-Chancellor, who has declared instead that the Company is entitled to claim the full amount of the debt as against the estates of both Mrs. Browne and her husband, provided that it shall not be entitled to receive more than twenty shillings in the pound in the whole on account of the sum due.

Mr. Wylie rests his appeal from this order on two propositions

Appeal.
1903.
BROWNE
v.
BROWNE.
Holmes, L.J.

—(1) that the Company could not have proved for the sum due on the mortgages without valuing the securities thereby given; and (2) that even if proof for the full sum could have been made originally, the Company, in the events that have happened, is only entitled to be paid out of Mrs. Browne's estate a dividend on the balance after giving credit for the £2894 received on account of the legacies. Neither of these questions could have arisen in a suit for the administration of assets previous to 1877; but the 28th section of the Judicature Act passed in that year has changed the previous law by enacting that in the administration by the Chancery Division of insolvent estates the same rule shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, as may be in force for the time being under the Irish Bankruptcy Law. We must, therefore, test the soundness of the two propositions by reference to that law. I find in *Re Plummer* (1) a clear statement of this branch of the law of bankruptcy by Lord Lyndhurst:—"If a creditor of a bankrupt holds a security on part of the bankrupt's estate, he is not entitled to prove his debt under the commission without giving up or realizing his security. For the principle of the bankrupt laws is that all creditors are to be paid on an equal footing; and, therefore, if a creditor chooses to prove under the commission, he must sell or surrender whatsoever property he holds belonging to the bankrupt; but if he has a security on the estate of a third person, that principle does not apply. He is in that case entitled to prove for the whole amount of the debt, and also to realize the security, provided he does not altogether receive more than twenty shillings in the pound." The rule thus stated is now well recognised, and of daily application; nor is it disputed by counsel for the appellant. They have, however, argued that the effect of the mortgages was to pay off the legacies, and that what was taken by the Insurance Company was the security of Mrs. Browne's estate discharged therefrom. I cannot accept this view of the transaction. The lands were not freed from the legacies, which were transferred to and held by the Company as a separate and distinct security. Therefore the

(1) 1 Phillips, 56.

creditor was entitled to prove for the whole sum due against Mrs. Browne's estate, and at the same time to take steps to raise the unpaid legacies. It follows as a corollary from this that part payment of the legacies after the proof was made cannot affect or reduce the proof. Of course in the proof credit must be given for all payments previously made, irrespective of the source from which such payments came; but to quote the words of Sir George Jessel in *Re Barned's Banking Company* (1):—"There can be nothing better settled in bankruptcy, and no rule less open to dispute, than that payment by a third party after proof does not reduce the proof." The only limitation is that the creditor can receive under his proof no more than will discharge the balance of his debt after giving credit for the subsequent payments.

Appeal.
1903.
BROWNE
v.
BROWNE.
Holmes, L.J.

In re Barned's Banking Company (1) is an interesting case, inasmuch as it explains an apparent exception to the general rule, based on the decision in *Ex parte Waring* (2), which, however, has no application to the present case.

The only authority quoted by Mr. Wylie in support of his second proposition is *The Commercial Bank of Australia (Limited) v. Official Assignee of the Estate of John Wilson & Co.* (3); but when properly understood, that case is against his contention. A bankrupt and others had become guarantors to a bank of a large sum due by a third party, and afterwards three of the guarantors agreed with the bank to limit their liability under the guarantee by substituting therefor a deposit of £3000. The only question in controversy was whether this amounted to payment of that sum; and as it was held that it did not operate as payment until appropriation, the bank was allowed to prove for the full amount of the debt against the estate of the bankrupt co-surety. I see no ground for interfering with the order of the Vice-Chancellor, and accordingly the appeal fails.

Solicitors for the plaintiff: *Meldon & Co.*

Solicitors for the North British and Mercantile Insurance Company: *William Roche & Son.*

R. D. M.

(1) L. R. 19 Eq. 13.

(2) 19 Ves. 344.

(3) [1893] A. C. 181.

M. R.

1903.

June 27.

July 1.

Appeal.

1904.

Jan. 25, 26.

THWAITES & CO. *v.* M'EVILLY.CANTRELL & COCHRANE *v.* MURPHY & BRADSHAW.

Trade mark—Selling mineral waters not of plaintiffs' manufacture in bottles embossed with plaintiffs' name, registered as a trade mark, but bearing labels with defendants' name and address as manufacturers—No actual fraud or deception proved—Meaning of "innocently" in sect. 2, sub-sect. 2, of Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28).

The plaintiffs were manufacturers of mineral waters in Dublin, which they sold to the trade in bottles embossed with their name, registered as a trade mark. The defendants, who were manufacturers of mineral waters in Limerick, received in the course of trade from their customers a large number of the plaintiffs' bottles so embossed, which they filled with mineral waters of their own manufacture, and sold to retailers, but with labels affixed bearing their own name and address as manufacturers, and stating the contents of the bottles. The defendants had not tried to pass off their mineral waters as the manufacture of the plaintiffs, nor was it proved that fraud was intended, or that any person had been deceived:—

Held (affirming the decision of Sir A. M. Porter, M.R.), that the defendants, by filling bottles bearing the plaintiffs' trade mark with mineral waters of the defendants' manufacture, committed an offence against the Merchandise Marks Act, 1887, sect. 2, and that placing labels bearing the defendants' own name on the bottles did not exonerate them.

THESE actions, which were tried together, were brought for injunctions to restrain the defendants from selling any aerated or mineral waters not manufactured by the plaintiffs in bottles bearing the plaintiffs' name embossed or moulded thereon, or in any form calculated or intended to pass off, or to enable others to pass off, such aerated or mineral waters as a manufacture of the plaintiffs.

The plaintiffs were manufacturers of aerated and mineral waters in Dublin, and their trade marks, "Thwaites and Company" and "Cantrell & Cochrane," were duly registered, and their registered trade marks were embossed or moulded on their bottles. Paper labels bearing the names of the contents of the bottles and the plaintiffs' names were also affixed to the bottles. The defen-

dants were manufacturers of aerated and mineral waters in Limerick, and in the course of trade they became possessed of a large number of bottles bearing the plaintiffs' trade mark, which they used in the ordinary course of business, filling them with aerated or mineral waters of their own manufacture. Large quantities of the plaintiffs' bottles so filled were sold in Limerick and the surrounding districts. The defendants attached to the bottles, so re-filled, a paper label bearing their own name, and also indicating the contents of the bottles, but the plaintiffs contended that these could be easily removed by any person desiring to pass off the contents of the bottles as being the plaintiffs' manufacture, or might be accidentally removed.

The defendants contended that the contents of the bottles were indicated, not by the embossing, but by the paper label, and that the embossing was not designed to indicate that the contents of the bottles at the time of any particular sale were the manufacture of the plaintiffs. They also contended that the paper label was essential, as being the only means by which the distinctive contents of the bottles were indicated.

By their defence the defendants pleaded that the only way they became possessed of any of the plaintiffs' bottles was in the following manner:—The defendants sold their mineral and aerated waters in plain bottles, or in bottles embossed with their names, and they sold the bottles along with the contents to the purchasers, allowing credit for such bottles as were afterwards returned to them by their customers. The plaintiffs often traded with shopkeepers or private individuals, who were also customers of the defendants, and from whom the defendants collected back and gave credit for empty bottles, which were sold by the defendants to said customers, filled with the defendants' mineral or aerated waters. The bottles so sold by the plaintiffs were then tendered by the said customers to the defendants, who had no alternative but to accept and give credit for the said bottles, or forfeit the custom of the said customers.

The defendants stated that they had made every effort to induce the plaintiffs to refrain from collecting the bottles in which the defendants' aerated or mineral waters were originally sold, or to exchange same with the defendants for bottles bearing the

M. R.
1903.
THWAITES
v.
M'EVILLY.

M. R. embossments of the plaintiffs, on such terms as would not be detrimental to the defendants, but the plaintiffs had refused to do so.
 1903.
THWAITES To return the empty bottles to Dublin could only have been done
v.
M'EVILLY. at a ruinous cost, and under these circumstances the defendants had been obliged to take back from their customers certain bottles of the plaintiffs, which they had used by filling them with their own mineral waters ; but upon every such occasion the defendants had affixed labels with defendants' own name indicating the contents of the bottles. The defendants had never passed off, or tried to pass off, their mineral waters as the mineral waters of the plaintiffs.

O'Shaughnessy, K.C., Blood, K.C., and Day, for the plaintiffs.

O'Brien, K.C., and C. F. Doyle, for the defendants.

July 1.

THE MASTER OF THE ROLLS :—

The difficulty in this case—and it is one of some difficulty—arises from the circumstance that there is no proof of an actual intention to deceive purchasers or the public ; and that there is no proof of anyone having been in fact deceived by the defendants' use of bottles bearing the plaintiffs' distinctive trade mark ; while, further, the defendants in this and the other cases assert a right to use bottles stamped or moulded with the plaintiffs' name and mark, by reason of what they consider unfair and unreasonable treatment by the Dublin mineral water manufacturers in declining to exchange bottles with the Limerick traders. The Dublin merchants charge for bottles in their invoices to country customers, and credit the amount when they are returned, but will not accept the bottles of Limerick manufacturers.

In Limerick the practice is different. The Limerick makers do not charge for bottles, but get back empties from their customers ; and they say that if they refused to take empty bottles, however branded, the customer would “ hail another van ” and deal elsewhere, with the result that their business would be heavily handicapped, if not destroyed.

With the mode in which traders in Dublin or Limerick choose to do business I have, of course, nothing to do directly. No one

need deal with any particular manufacturer who does not like the terms. But as I understand the way Mr. O'Brien used this controversy, it was to show that his clients were driven to use any bottles they could get, and did use them, however branded, not because of the brand, but because if they discriminated between bottles bearing plaintiffs' trade mark and other bottles they would soon accumulate a stock of bottles quite worthless to them, and would be ruined by having to buy new ones in their place. This was relied on as negating any fraudulent intent, and amounting to proof of "innocence" on the defendants' part.

Now it is settled, notwithstanding some rather ambiguous expressions used by Grantham, J., in the case of *Manson v. Cooper* (1), that the word "innocently" in the second section of the Merchandise Marks Act of 1887 does not necessarily mean absence of an intention to defraud purchasers. The goods sold may be equal or superior to those to which the trade mark lawfully belongs. The purchaser might even buy with knowledge that the brand was false, and, with the intention of gaining thereby, by disposing of the goods at a large profit. In such a case he would not be defrauded, yet the sale to him would not be "innocent." To prove innocence the vendor must show that he was not aware that he was violating the Act of Parliament, which says, in section 2, sub-section 2 (a), that having taken all reasonable precautions against committing an offence against this Act, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the trade mark, mark or trade description, and (b) that on demand made by or on behalf of the prosecutor he gave all the information in his power with respect to the persons from whom he obtained such goods or things; or (c) that otherwise he had acted "innocently"; and except in such cases he shall be guilty if he "sells or exposes for, or has in his possession for, sale, or any purpose of trade or manufacture, any goods or things to which any forged trade mark or false trade description is applied, or to which any trade mark, or mark so nearly resembling a trade mark as to be calculated to deceive, is falsely applied, as the case may be." The offence consists in doing what

M. R.
1903.
THWAITES
v.
M'EVILLY.

(1) [1900] 2 Q. B. 522.

M. R. the statute forbids, *i.e.* in "selling, etc.," any goods or things to
 1903. which any forged trade mark or false trade description is applied,
THWAITES or to which any trade mark, or mark as nearly resembling a trade
v. mark as to be calculated to deceive, as the case may be; and the
M'EVILLY. "innocence" of the person selling, if he be innocent, is for him
 to prove.

In the present case that which is relied on as a defence is the fact that the defendant in each instance placed his own labels upon the bottles—each label containing, besides the designation of the precise liquid contents, the defendant's name and address; and he said, truly enough, I think, that a person who read the label would not suppose that the contents were the manufacture of Thwaites. But everyone does not read the labels; they are liable to fall off by accident, and besides an unprincipled person could easily remove them altogether. There was a statement by a witness that it would require twenty minutes to remove a label. It could be done, I think, quite easily in two. If some dozens were placed in water, the labels would very soon drop off. But even if it required twenty minutes to get them off, what is that? Again, even if the label is not interfered with, the bottle can be so placed on shelf or counter that the label will be at the back and so hidden, while the branded trade mark and trade description will be exposed to the customer's view. Anyone can try this for himself by simply turning a bottle round, with the label at the back. The labels used by the defendants in these cases are of ordinary size and appearance, and there is no evidence that they were used, or could be used, so as to cover up the plaintiffs' name and trade mark, as was suggested by Sir George Jessel in *Barrett v. Gomm* (1). Indeed they could not be so used. The fact is that the defendants here have sold their own manufacture in bottles bearing in permanent shape the plaintiffs' name and trade mark, though also bearing at the time of sale the defendants' name on a label attached by gum or other adhesive substance, that is, each bottle when sold bore two trade descriptions, one true and the other not true. This practice has been persevered in after warning by cautionary notices, and, in M'Evilly's case, after prosecution and conviction in the

Police Court, appeal to the Quarter Sessions, and confirmation of the conviction on a case stated for the Court of Crown Cases Reserved. It cannot be doubted that each such bottle bore "a false trade description."

M. R.
1903.
—
THWAITES
v.
M'EVILLY.

An excuse rather suggested than relied on was, that in the hurry of business it would be impossible to examine the empties, and that so bottles bearing plaintiffs' trade mark would be liable to be accepted by or for the defendants *per incuriam*. Even if so (and it might probably be so in a few instances), that would not justify their being re-filled and issued again. But this is not so, save in few and exceptional cases of accident or mistake: for the bottles taken up from customers are examined, to some extent at least. Broken or injured bottles are not accepted, and the most cursory examination would show whether they have the mould of the plaintiffs' brand; a blind man could tell that.

In *Rose v. Loftus* (1) only one act of user of bottles bearing the plaintiff's trade mark was established, being in respect of four dozen of lime juice placed in bottles moulded with the plaintiff's registered device and name, but bearing defendant's name on a label. The defendant gave an undertaking not to repeat the act. Fraud was alleged, but disproved; and under all the circumstances Malins, V.-C., accepted the undertaking instead of an injunction, and did not award costs, the defendant having admitted the facts on which plaintiff relied, and none other being proved. If the defendant had asserted a right to use Rose's bottles as covers for his own goods as often as he pleased, and announced his determination to do so, the result would have been materially different. As it is, the case is an authority in favour of the plaintiff, unless there be some substantial difference in the law applicable to lime juice from that applicable to soda-water or their respective bottles. No doubt the bottles are different, but that is only a question of degree.

Welch v. Knott (2) was decided in 1857, and of course before the statute. It was therefore a question of passing off the defendant's goods as those of the plaintiff, who traded as Schweppe & Co. Lord Hatherley held on the evidence that there was no

(1) 47 L. J. Ch. 576.

(2) 4 K. & J. 747.

M. R.
1903.
THWAITES
v.
M'EVILLY.

user of the bottles by the defendant with the intent, or with the probable result, of misleading the public. It is undoubted that that decision was right; but it is equally plain that it is no authority on a statute which defines the mischief aimed at, and which has been decided to be applicable without any intent to deceive the public.

In *Wood v. Burgess* (1), which was a case stated by a magistrate, the question arose as follows:—The appellant and respondent were rival manufacturers of mineral water, and the appellant used for the purposes of his trade glass bottles, on some of which were moulded his name and address, “T. Wood, 430, Hackney-road,” and on others of which were moulded the words “This bottle is the property of Thomas Wood, 430, Hackney-road. No deposit charged.” A considerable number of his bottles so moulded found their way into the possession of the respondent, who caused these bottles to be filled with mineral waters of his own manufacture, and issued them, so filled, to his own customers; but before issuing them, he caused a paper label bearing his own name, and in the following form:—

BURGESS'S
LEMON,
215 Brick Lane,
Bethnal Green Road.

to be affixed to the bottom of each bottle, and the delivery of such bottles to his customers was in every case accompanied by an invoice in the following terms:—“Received from T. Burgess, Mineral Water Manufacturer.” He had no authority from the appellant to use bottles bearing the appellant's name. There were found in the respondent's van, in the course of sale and delivery to the respondent's customers, certain of the appellant's bottles moulded, filled, and labelled as I have stated. The magistrate dismissed the summons, and the questions for the opinion of the Court were:—1. Whether selling mineral waters enclosed in bottles bearing the name of another manufacturer stamped upon them, but without any intent to defraud the purchaser, was an offence against the Merchandise Marks Act, 1887. 2. Whether

an intent to defraud was a necessary ingredient in the offence under section 2, sub-sect. 2. 3. Whether the words "acting innocently" in sub-section 2 had any different meaning from the words "without intent to defraud" in sub-sect. 1. The case was fully argued for the appellant. No counsel appeared for the respondent. Lord Coleridge, C.J., says:—"I am of opinion that the magistrate was wrong in the view which he took, and that an intent to defraud the purchasers is not a necessary ingredient of the offence charged." And Mr. Justice (now Lord Justice) Mathew concurred.

M. R.
1903.
THWAITES
v.
M'EVILLY.

Several states of fact besides those in sub-sections (a) and (b) may be suggested, which would render a sale under a false trade mark innocent, *e.g.* if the vendor *bona fide* believed that he had the authority and consent of the owner of the trade mark; or if, in spite of all reasonable precautions, a sale had taken place of a bottle, or even a few bottles, bearing a trade mark, but not believed or suspected to bear it. Possibly even the reasonable belief that the trade mark had been abandoned, or assigned to someone who did not intend to use it, or the like, might amount to innocence in its use within the Act. But where a man knows that another is the owner of a trade mark, and intentionally uses it by applying it to his own goods, from motives of personal convenience or profit, I am of opinion that he cannot, under the statute, claim immunity on the ground of innocence; and further, that in every such case he acts at his own peril, and with the *onus* upon him of proving his "innocence."

In *Coppen v. Moore* (1), No. 2, on a case reserved by a Divisional Court, it was held that a master was under this statute criminally answerable for the acts of his servants acting within the general scope of his employment, although contrary to the master's proved orders, unless the master shows that he has done all that was possible to prevent the offence.

Lord Russell of Killowen says (p. 314):—"In answer, then, to the question which alone is put to us, namely, whether upon the facts stated the decision of the magistrates convicting the appellant was in point of law correct, our answer is that in our judgment it was. When the scope and object of the Act are

(1) [1898] 2 Q. B. 306.

M. R. borne in mind, any other conclusion would to a large extent render
 1903. the Act ineffective for its avowed purposes. The circumstances
 THWAITES of the present case afford a convenient illustration of this. The
 v. appellant, under the style of the 'London Supply Stores,' carries
 M'EVILLY. on an extensive business as grocer and provision dealer, having,
 it appears, six shops or branch establishments, and having also a
 wholesale warehouse. It is obvious that, if sales with false trade
 descriptions could be carried out in these establishments with
 impunity, so far as the principal is concerned, the Act would to
 a large extent be nugatory. We conceive the effect of the Act to
 be to make the master or the principal liable criminally (as he is
 already by law civilly) for the acts of his agents and servants in
 all cases within the sections with which we are dealing, where the
 conduct constituting the offence was pursued by such servants and
 agents within the scope or in the course of their employment,
 subject to this: that the master or principal may be relieved from
 criminal responsibility where he can prove he had acted in good
 faith and had done all that it was reasonably possible to do to pre-
 vent the commission by his agents and servants of offences against
 the Act. The result, therefore, is that the conviction will be
 affirmed, and with costs." In that case the appellant had sent
 out a notice to the managers of his various shops, which was in
 these terms: "Most important.—Please instruct your assistants
 most explicitly that the hams described in list as breakfast hams
 must not be sold under any specific name of place or origin. That
 is to say, they must not be described as 'Bristol,' 'Bath,' Wilt-
 shire,' or any such title, but simply as breakfast hams. Please
 sign and return.—W. H. COPPEN"; and notwithstanding this
 notice the Court held the conviction of Coppen was right, an
 assistant in one of his shops having sold a ham under a false trade
 description.

The case of *Christie and others v. Cooper* (1) has, I think, been
 somewhat misunderstood. In the case stated the magistrate used
 the following language, that "since the object of section 2, sub-
 sect. 2, was to prevent the sale of goods to which any forged
 trade mark is applied, Messrs. Christie, Manson, and Woods could
 not rely on sub-section (c) as a defence unless they had been

innocent of any knowledge or reasonable ground of suspicion at the time of sale that the trade mark was in fact forged, and that their state of mind towards the purchaser was immaterial for this offence. He accordingly convicted them, and stated this case for the opinion of the Court."

M. R.
1903.
THWAITES
v.
M'EVILLY.

Both Judges who tried the case held, and I think rightly, if I may be allowed to say so, that this opinion of the magistrate upon the section was wrong, or at least too narrow, because it deprived sub-section 2 (c) of any operation, by construing it as identical with (a). It is plainly meant to include cases not within (a) ("otherwise he had acted innocently"). Mr. Justice Grantham thought that it followed that the conviction should be quashed. Mr. Justice Channell doubted whether the case should not be sent back to the magistrate for further consideration, but yielded his opinion on that point. I think, perhaps, his view on this point was the right one. At any rate, his construction of the statute appears to me to be sound. He says, p. 528-9 :—"The magistrate has held that they could not be said to have acted innocently unless they could show that they had been innocent of any knowledge or reasonable ground of suspicion at the time of the sale that the trade mark was in fact a forged trade mark. That cannot be right, for, as pointed out by my brother Grantham, that is the gist of sub-section (a), and sub-section (c) goes on to say 'that otherwise he had acted innocently.' That assumes that there must be other cases of innocence beside absence of knowledge or of suspicion. The result is, as it seems to me, that it is open to the defendant to set up, under sub-section (c), any absence of *mens rea*. It seems to have been contended before the magistrate that the state of mind of the seller to the purchaser was material as regards a prosecution for this offence, and that in order to establish his innocence it was sufficient to show that he did not intend to defraud the purchaser. That seems to me to have been a false point. The innocence contemplated by the Act is innocence of any intention to infringe the Act of Parliament, and that is the point which, I think, the magistrate ought to have considered. It seems to me quite clear that there may be innocence of any intention to infringe the Act, even although there may be suspicion of the genuineness of the article or trade mark. That is what

M. R.
1903.
THWAITES
v.
M'EVILLY.

the word '*otherwise*' means, as I think. That being so, it seems to me that the decision of the magistrate proceeded on a wrong ground."

While recognising the honesty of purpose shown by Messrs. Christie, it would rather appear to me that a strict interpretation of the statute might have led to a conclusion, generally applicable, that if a man has goods marked with a trade mark false in fact, he is liable to the penalty, unless he affirmatively show (a), (b), or (c), and that if he has reason to suspect the genuineness of the trade description, his course is not to sell the goods or keep them for sale. I do not see what evidence of "innocence," in a legal sense, was given or alleged in that case, if it were not innocence of an intent to defraud purchasers, which is not enough. But it is to be observed that the case stated did not fully raise the whole question.

Starey v. The Chilworth Gunpowder Company (1) is a strong case. The respondents, who were manufacturers of gunpowder, entered into a contract with the Government to supply gunpowder. Owing to an accident in their mills they were unable to manufacture the powder they had contracted to supply. Being pressed for the delivery of the powder, they bought German manufacture and put it into barrels containing their own name and a description applicable to the powder of their own manufacture. The powder was in fact equal in quality to that of their own making, but there was no indication on the label or otherwise on the barrels that the powder was of German manufacture. It was held that the respondents were guilty of the offence of applying a false trade mark description to goods within the Merchandise Marks Act, 1887, and that they had acted with intent to defraud within the meaning of section 2, sub-sect. 1 (f), and were liable to be convicted.

I do not refer at length to the case of *Rex v. M'Evilly* (2) (the present defendant) only because it is suggested on his behalf that the proper point was not reserved for the Court of Criminal Appeal. It is clear, however, that that case was decided on facts really admitted, one of them being that a false trade name was

(1) 24 Q. B. D. 90.

(2) 2 New Ir. Jur. 116.

applied to the defendants' goods, and that being the only question which it was suggested was open and not covered by the case stated.

M. R.
1903.

THWAITES
v.
M'EVILLY.

The result is that, in my opinion, the defendant has not shown that he acted innocently within the meaning of the statute; and as he and the defendant in the other cases have justified what they have done, and stated that they intend to continue to act as heretofore, there must be an injunction in each case with costs.

If there is any hardship in the law they have the remedy in their own hands by simply refusing to receive as empties any bottles bearing the plaintiffs' brand.

R. W. L.

The defendants appealed (1).

Appeal.
1904.

O'Brien, K.C., and *C. F. Doyle*, for the appellants :—

Jan. 25, 26.

There is no property in a trade mark, though there is in a patent; but a Court of Equity would always restrain by injunction a person who was trying to pass off goods to the detriment of another manufacturer: *Singer v. Loog* (2); *Birmingham Vinegar Brewery Co. v. Powell* (3). What the Act was intended to prevent was affixing a false trade name or trade mark to goods, for the purpose of passing them off as the manufacture of another. The facts of this case show that there was no such intention, because the defendants, before using the plaintiffs' bottles, affixed labels with their own names on them. It was impossible for the defendants to return the plaintiffs' bottles, and pay for the carriage, as the cost would be ruinous. There was no intention to deceive, and the defendants acted innocently. The Court must consider the joint effect of the embossment and the label: *per Palles, C.B.*, in *Findlater v. Quirke* (4). The transaction must be taken as a whole. *Reg. v. M'Evilly* (5) does not apply, because that case

(1) In the Court of Appeal, before
FITZGIBBON, WALKER, and HOLMES,
L.JJ.

(2) 8 A. C. 15.

(3) [1897] A. C. 710.

(4) 3 New Ir. Jur. 165.

(5) 2 New Ir. Jur. 116.

Appeal.
1904.
THWAITES
v.
M'EVILLY.

came before the Court on a case reserved, and it was assumed at the trial that the name used was a false trade description, and the Judge was not asked to leave any question on that to the jury.

O'Shaughnessy, K.C., Blood, K.C., and Day, for the respondents :—

Proof of actual fraud or intention to pass off is not necessary. The sale of mineral waters of the defendants in bottles bearing the name of the plaintiffs embossed is in itself an offence under the Act, and the use of the label is no excuse : *Allen v. Richards* (1). This is a case of using a registered trade mark.

Jan. 26.

FITZ GIBBON, L. J. :—

It is difficult to keep the portions of the Merchandise Marks Act, 1887, which deal with "trade marks" separate from those which deal with "trade descriptions"; and the difficulty is increased by the citation of cases dealing with "false trade descriptions," which have no application to the present case, in which the cause of action is the illegal use of a registered "trade mark." In my opinion, the objects of the Legislature, as regarded trade marks, are twofold—first, the protection of persons who have the exclusive right to use trade marks, and who have a monopoly of them; and, secondly, the protection of the public against being deceived into purchasing goods made by people other than the proprietors of the trade marks on the faith of which the goods are bought. These objects are distinct, and we have to determine, upon the words of the Act, what the protection is which the Legislature has deemed it necessary to give, for the purpose of securing each of them. Having ascertained what the Legislature has defined to be an illegal use of a trade mark, the Court is not at liberty to cut the protection down to cases in which fraud or "passing off" has been proved or intended, or in which acts have been done which were calculated to deceive, further or otherwise than by coming within the prohibitive words of the statute. There may be cases where, in ninety-nine out of a hundred instances, no mischief would result, yet in the hundredth case it

might occur, even unintentionally; and all that the Court has to do is to ascertain whether, in order to give the desired protection, the Legislature has declared that the thing done shall be an offence against the Act.

In the present case we must ascertain, first, whether the defendant has done an act which *prima facie* comes within the definition of an offence against the Act; and, secondly, if so, whether he has proved anything sufficient to bring him within the statutory exemption. Leaving out immaterial and alternative words, but adding or altering nothing, and omitting nothing material, the Act, section 2, defines the alleged offence as follows:—

“(2) Every person who sells, or has in his possession for any purpose of trade, any goods to which any trade mark is falsely applied, shall be guilty of an offence against this Act.”

This definition says nothing about *mens rea* or intent; nothing about deceit or fraud. The condition of exemption is as follows:

“Unless he proves—(a) That having taken all reasonable precautions against committing an offence against this Act, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the trade mark; and (b) that on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods; or (c) that otherwise he had acted innocently.”

Beyond question, what the defendant did in the present case came within the definition of the offence, and was *prima facie* an infringement of the Act. That he sold mineral waters made by himself, to which the trade mark, in some cases of Thwaites, and in other cases of Cantrell and Cochrane, was falsely (*i.e.* contrary to the fact) applied, was proved and admitted. In fact the defendant contended that he was entitled to have in his possession, and to use for the purpose of trading in mineral water made by himself, bottles to which the trade marks of other makers were applied. His defence was that he could not carry on his trade profitably unless he did this.

Again omitting immaterial words, sect. 5 says:—

“(1) A person shall be deemed to apply a trade mark to goods who places any goods which are sold or had in possession for any purpose of

Appeal.
1904.

THWAITES
v.
M^cEVILLY.

Fitz Gibbon,
I. J.

Appeal.
1904.

THWAITES

v.

M'EVILLY.

Fitz Gibbon,
L.J.

trade, in any covering to which a trade mark has been applied. (2) The expression 'covering' includes any bottle. A trade mark shall be deemed to be applied whether it is impressed or otherwise affixed to the goods or to any covering. (3) A person shall be deemed to falsely apply to goods a trade mark who, without the assent of the proprietor of a trade mark, applies such trade mark; but the burden of proving the assent of the proprietor shall lie on the defendant."

The defendant here cannot escape from these express and definite enactments unless he proves (a) and (b), or (c), under sect. (2).

In my opinion the observation of Palles, C.B., in *Findlater v. Quirke* (1), that what the Court had to look to was the joint effect of the embossment and the label, even if it be law as to a trade description, is not applicable to the present case. The marks embossed on the bottles which the defendant used were the registered trade marks of proprietors who did not assent to their being affixed to the goods of the defendant. This is not a case in which a mark so nearly resembling a trade mark as to be calculated to deceive has been used or applied; the actual trade mark of one maker has been applied to bottles containing the goods of another. It is not a case of "trade description," true or false. Had it been so, the question might have arisen whether the combined effect of the two things, the embossed trade mark and the paper label, was or was not an indication, direct or indirect, as to the place in which the goods were made, or as to the mode of manufacturing them. But there are no qualifying words in the provisions against applying a trade mark.

An argument was founded on the fact that the provisions of section 3 relating to "false trade description" are extended to cases where such a description "is a trade mark or part of a trade mark"; and to cases of the application to goods of any "figures, words, or marks, or arrangement or combination thereof, whether including a trade mark or not." In these provisions, deceit, or the risk of misleading, may be material, but they relate to cases of "false trade descriptions," and not to the false application of a "trade mark."

In my opinion, where a registered trade mark is "falsely applied," deceit and the risk of misleading are assumed or

become immaterial, and the offence is *prima facie* completed, and the condition or burden is thrown on the defendant of proving that he comes within (a) and (b), or (c), of sect. 2 (2).

These defined exemptions cannot help the defendant here. Clauses (a) and (b) have no application to the facts; "reasonable precautions," "the genuineness of the trade mark," "the information in his power," have nothing to do with the present case.

There remains only the alternative (c), "or that otherwise he had acted innocently." This cannot mean that, having knowingly and wilfully applied the trade mark of another manufacturer to his own goods, the defendant can exonerate himself by adding to the trade mark a label bearing his own name, and saying that he has no intention to deceive. In my opinion, the words "otherwise acted innocently" apply to cases similar to those described in (a) and (b), where he can prove that he was innocent of any intention to infringe the Act; for instance, that he was unaware that the mark applied to the goods was the trade mark of another manufacturer, or that the act was done by some other person for whom he was not responsible; but they cannot apply to a case like the present, where the defendant admittedly knew that the embossments on the bottles were registered trade marks which he wilfully applied to goods which were not manufactured by the proprietors of those marks.

It has been argued that an injunction would cause great inconvenience to the defendant's trade. But no inconvenience could have arisen, if the defendant had insisted that his customers should return him his own bottles; or if he had refused to accept—or to give credit for—bottles bearing the trade marks of other manufacturers. Allowing customers to mix the bottles, or the practice of some manufacturers of accepting bottles indiscriminately, cannot excuse infringing the Act by filling bottles bearing the plaintiffs' trade marks with goods not manufactured by them.

It was said that the plaintiffs had parted with the property in the bottles by selling them to customers from whom the defendant had acquired the property in them. But the object of the Act—namely, to stop a practice which the Legislature considered to be injurious, that of applying the trade mark of one manufacturer to

Appeal.
1904.
THWAITES
v.
M'EVILLY.
Fitz Gibbon,
L.J.

Appeal.
1904.
THWAITES
v.
M'EVILLY.
Fitz Gibbon,
L.J.

the goods of another, in the course of trade—has nothing to do with the ownership of the thing which falsely bears the mark.

Fraud, or intention to deceive, is not a necessary ingredient in the offence of applying a trade mark contrary to the fact, which is what the Act means by “falsely” applying it. That has been done by the defendant; and it is no answer or defence that he did not intend to deceive, or that he put on the goods—besides the trade mark—a label bearing his own name. The decision of North, J., in *Allen v. Richards* (1), is an authority in favour of our decision, which is that the appeal must be dismissed, and the order of the Master of the Rolls affirmed with costs.

WALKER, L.J. :—

I concur. There are only two questions in the case—first, has the defendant violated the Act of Parliament? secondly, if so, has he brought himself within either of the exempting clauses by putting the labels on the bottles? This is the case of a registered trade mark, which stands upon a higher plane than that of a trade description, and is governed by different considerations. By the Act of 1887 an offence was committed by affixing a trade mark to any goods to which they did not belong, unless the defendant could prove that he had “acted innocently.” How could the defendant prove that he had acted innocently, when he admitted that he knew that the mark on the bottles was the trade mark of another person, that he filled them with goods of his own manufacture, that he did so for the purpose of sale, and had actually sold them, that he was aware of the Act of Parliament, that he knew that the Act declared that that should not be done, but put his own construction on it, and contended he was entitled to do it, because he put on the bottles a label bearing his own name? The Act of Parliament distinctly declares that that should not be done; and I cannot conceive how the defendant could say he had acted innocently. By section 5, “A person shall be deemed to apply a trade mark to goods who applies it to the goods themselves, or to any covering, label, reel, or other thing in or with which the goods are sold or exposed, or had in possession for any purpose of

sale, trade, or manufacture"; and the expression "covering" includes any "stopper, cask, bottle, vessel, box, cover, capsule, frame, or wrapper." Reading those definitions into the 2nd section, the defendant has plainly been guilty of an offence against the Act, and he could not show that he had acted innocently, because he knew that he had done so. The decision of the Master of the Rolls must be affirmed.

Appeal.
1904.
THWAITES
v.
M'EVILLY.
Walker, L.J.

HOLMES, L.J. :—

I concur. The case, in my opinion, does not admit of question. The defendant had in his possession for the purposes of sale, and had actually sold, bottles containing mineral water of his own manufacture, to which the trade marks of other manufacturers had been falsely applied; and it is admitted that he was aware of the existence of those trade marks on the bottles. Under those circumstances the plaintiffs were clearly entitled to an injunction, unless the defendant was able to show that he was exempted by the statute. What the defendant suggested as entitling him to exemption was that he had put on the bottles a label bearing his own name as the manufacturer, and that this showed that he had no intention to deceive, and was entitled to exemption as having "acted innocently." What is the meaning of having "acted innocently"? Is the Court to hold that it means the absence of intention to deceive? I think not. "Innocently," in my opinion, means that the defendant was innocent of any intention to infringe the Act. He did not act innocently if he knew, as he did know, that he had applied to goods of his own manufacture the trade mark of another, and if he endeavoured to avoid the consequences by attaching a label bearing his own name.

Solicitor for the plaintiffs: *Gerald Byrne.*

Solicitor for the defendant: *James A. Doyle.*

R. D. M.

Barton, J.
1904.

Mar. 14, 24.

RUSSELL v. LAWDER.

(1904. No. 172.)

*Will—Executors—Settlement—After-acquired property—Married woman—
Bequest—Restraint on anticipation.*

A testator bequeathed certain freehold property and a legacy of £5000 to his daughter, a married woman, for her sole and separate use, independent of any husband she might marry, without power of anticipation. The settlement executed on the marriage of his said daughter contained an “after-acquired” property clause. Testator nominated executors of his will, but did not appoint trustees:—

Held, that as there was no intention expressed in the will that the executors were to act as trustees and retain the fund, the fund should be paid over to the testator's daughter free from restraint, and that it was captured by the “after-acquired” clause in her marriage settlement.

By indenture of marriage settlement, dated 29th March, 1895, executed on the marriage of Arthur William Lawder and Sarah Elizabeth Hill, it was provided that if the said Sarah Elizabeth Hill should at any time during her coverture, from one and the same source, become seised, or possessed of, or entitled to, or have an absolute power of disposition of, any real or personal property of the value of £500 or upwards for any estate or interest, except the property thereinbefore settled, and except jewels, plate, personal ornaments, or chattels of a similar nature, which it was thereby agreed should belong to the said Sarah Elizabeth Hill for her separate use, then, and in every such case, the said Sarah Elizabeth Hill and all other necessary parties should, at the cost of the said trust estate, as soon as circumstances would admit, do all such acts and things as should be necessary or expedient for effectually vesting the same in the trustees of said settlement upon the trusts therein mentioned. Joshua Forbes Russell, George Edward Reade, and John S. Russell were thereby appointed trustees of said settlement.

Joshua Forbes Russell, the father of the said Sarah Elizabeth

Hill, and one of the said trustees, made his will on the 23rd of January, 1895, and thereby, among other things, left to his said daughter and her assigns for ever certain houses and premises, and also the sum of £5000, in the following terms, viz. :—" I leave to my daughter Sarah Elizabeth Hill, and her assigns for ever, the houses and premises in Ely Place, in the city of Dublin, to hold in fee-farm, and also the sum of £5000, for her sole and separate use, independent of any husband she may marry, without power of anticipation." He nominated Edmond B. Russell and John S. Russell executors of his will, but did not appoint any trustees.

Barton, J.
1904.
RUSSELL
v.
LAWDER.

Joshua Forbes Russell died on 10th July, 1903, and probate was granted to the executors named in the will.

George Edward Reade predeceased the testator, and accordingly John S. Russell was at the time of these proceedings the surviving trustee of the above-mentioned marriage settlement.

Arthur William Lawder, the husband of the said Sarah Elizabeth Lawder, being alive, the question arose whether on the true construction of the will the executors would be justified in paying to her the said sum of £5000, in which event it would be captured by the after-acquired clause in her marriage settlement, or whether the executors were bound to retain same and pay the income only to Sarah Elizabeth Lawder during her present coverture.

The present summons was taken out by the executors to take the opinion of the Court on this question.

Garrett W. Walker, for the applicants :—

In a case like the present the principle upon which the Court proceeds is whether there is an intention expressed in the will that the trustees are to retain the money. That is really the ground of the decision in *In re Bown* (1). In that case, no doubt, it was held that the trustees were to retain the money, but there was a preceding life estate, the gift being only a reversionary one, and the words restraining anticipation had full effect given to them by preventing the lady from charging the fund before it fell into possession. *In re Currey* (2) is perhaps not quite consistent with the preceding case, because Chitty, J., appears to have overlooked the

(1) 27 Ch. D. 411.

(2) 32 Ch. D. 361.

Barton, J. true ground upon which *In re Bown* (1) was decided. The principle, however, laid down in *In re Bown* (1) is referred to and followed in *In re Grey's Settlements* (2), where Cotton, L.J., at p. 714, says that the rule was correctly laid down in *In re Bown* (1), that the question whether the restraint on anticipation is to apply not only to the income but also the capital, depends upon the intention of the testator expressed in the will. In the present will there is no antecedent life estate. There are no trustees, and no machinery provided by the will for the retention of the money. Moreover, the gift is coupled with a devise of real estate, over which the executors have, of course, no control. The restraint on anticipation is only effectual till payment. [He also cited *In re Tippet's & Newbould's Contract* (3); *In re Holmes* (4); *In re Fearon* (5); *In re Taber* (6); *In re Coombes* (7); *In re Bankes* (8).]

Richard Best, for Mrs. Lawder, the defendant :—

I quite admit that the whole question is one of intention. In the present case the restraint on anticipation can have no effect, and would be mere surplusage unless some period can be shown during which the money was to be tied up. Effect can only be given to the restraint on anticipation by assuming an intention on the part of the testator that the executors should retain the fund. In all the cases cited there was a preceding life estate or a specific direction to pay at a certain time, and therefore they afford no assistance in the present case.

March 24.

BARTON, J. :—

In cases of this kind the Courts were at one time in the habit of applying a certain test, namely, whether the fund was an income-bearing fund or a sum of cash. The Court of Appeal in England, in 1884, in *In re Bown* (1), discarded that test, and the Courts have since the date of that decision endeavoured in each case to ascertain whether it was the intention of the testator that the

(1) 27 Ch. D. 411.

(2) 34 Ch. D. 712.

(3) 37 Ch. D. 444.

(4) 67 L. T. 335.

(5) [1896] W. N. 175.

(6) 51 L. J. Ch. (N. S.) 721.

(7) [1883] W. N. 169.

(8) [1902] 2 Ch. 333.

money should be paid over to the married woman, or that the income should be paid to her from time to time. *In re Bown* (1) was a case of a reversionary fund, and in such a case it is easier to arrive at the conclusion that it was the intention that the money should be paid over to the married woman, because there is a clearly marked interval before the money falls into possession for the restraint upon anticipation to operate upon. But the judgments of Cotton, L.J., and Lindley, L.J., were not limited to the case of reversionary funds, and while it may be said that a reversionary fund makes an *a fortiori* case, the rule has been applied in subsequent cases to bequests which were not of a reversionary character. Cotton, L.J., at p. 422, said: "In my opinion, the question depends upon the intention of the testator declared in his will. Has he declared an intention that the money should be paid to her, or that the income should be paid to her from time to time?" Lindley, L.J., at p. 424, said: "But I decide upon the ground that I cannot find any intention that the trustees are to keep the fund, and pay only the income to her. Therefore, I think she is entitled to be paid the capital of the fund."

Barton, J.
1904.
RUSSELL
v.
LAWDER.

The rule laid down in *In re Bown* (1) was followed and applied in *In re Holmes* (2), *In re Grey's Settlements* (3), *In re Bankes* (4), and in other cases. It is true, as pointed out by Mr. Best, that in nearly all these cases there was a direction to "pay to" the married woman, which aided the construction that the married woman was to take the capital. But the special feature of the present case seems to be, that there are no trustees appointed by the will, and that the testator has provided no machinery for giving effect to the restraint upon anticipation after the time for payment of the legacy should arrive. In *In re Currey* (5) the decision of Chitty, J., that the money in that case should not be paid to the married woman, turned largely, as appears from the concluding words of his judgment, on the circumstances that there were trustees in whom the legal estate was vested. I have not been referred to any case where, in the absence of the appointment of

(1) 27 Ch. D. 411.

(2) 67 L. T. 335.

(3) 34 Ch. D. 712.

(4) [1902] 2 Ch. 333.

(5) 32 Ch. D. 361.

Barton, J.
1904.
RUSSELL
v.
LAWDER.

trustees and in the absence of the creation of any express trust, the Court has, in order to give effect to a restraint upon anticipation, directed executors to retain, invest, and hold moneys upon trust for a married woman. In case of a bequest to a married woman for her separate use without the intervention of trustees the Court was in the habit, before the passing of the Married Woman's Property Act, of protecting the separate use by treating the husband as trustee—not by directing the executors to convert themselves into trustees of the legacy. It was not suggested in the course of the argument that, so far as the present application is concerned, the Court can give effect to the restraint upon anticipation in any other way than by holding that the executors were intended to hold the legacy as trustees.

Mr. Best admits that there is nothing in the will indicating that the legacy should be retained by the executors upon trust, unless it can be evolved from the words "without anticipation." It was suggested by Mr. Garrett Walker, as an explanation of the presence in this context of the words "without anticipation," that the testator may have inserted those words with the idea or wish present to his mind of protecting the legacy from anticipation during the interval between his death and the payment of the legacy. He may have considered that an expectant legatee awaiting the receipt of a legacy might, during that interval of time, be subject to the influence of persons willing to help her to anticipate the enjoyment of her legacy by mortgage or assignment or other form of anticipation. Some notion of that kind may have been in the testator's mind. At all events I am unable to say that the testator intended his executors to retain and invest the sum of £5000, and to convert themselves into trustees in respect of it upon a trust to pay the income to the legatee. If that was his intention, why did he not say so, and why did he provide no machinery for giving effect to such an intention? The Court will not allow a trust to fail for want of a trustee. But in this case there is the preliminary question—did the testator intend to create any such trust? In this will executors are appointed by words which do not indicate any intention of throwing upon them any further or other burden than the ordinary duties of executorship. When no such intention is expressed, I do not feel at liberty

to read into the will a direction throwing upon executors the duty of holding a legacy upon trust to pay the income to a legatee during her coverture or during her life instead of paying it to the legatee in due course of administration. When it is sought to draw such an extensive inference from the mere occurrence of the words "without anticipation" attached to a legacy to a married woman for her separate use, it is right to bear in mind that, as Fry, L.J., pointed out in *Stogdon v. Lee* (1), the Courts lean against a restraint upon alienation, for the reason that a gift of property to a person involves the gift of a power to alienate it, and an instrument which, while giving property, takes away the incidental power of alienation, must always receive a strict construction. We are not concerned upon the present summons with the gift of the freehold property, but the considerations applicable to that gift seem to strengthen the view of the will which I have adopted.

For these reasons I hold that the sum of £5000 is payable by the executors to Mrs. Lawder. It has been conceded that, if and when payable to her, it will be acquired by her free from restraint, and will be captured by the covenant in her settlement to settle after-acquired property.

Solicitors for the applicants: *Falls & Company.*

Solicitors for the defendants: *Norman & Law.*

J. MAC M.

(1) [1891] 1 Q. B. at p. 670.

Barton, J.
1904.

RUSSELL
v.
LAWDER.

Barton, J.
1904.

April 25.
May 6.

—
Appeal.
June 22.

MOORE *v.* M'GLYNN.

(1892. No. 284.)

*Administration—Executor and trustee—Authorised trading—Costs, charges,
and expenses—Indemnity—Deficient estate—Priority.*

An executor and trustee, who has been authorised to carry on the testator's business both by the will and by the Court, and who has properly incurred liabilities to trade creditors, is entitled to an indemnity in respect of such liabilities; and where the assets are deficient, the amount of such indemnity takes priority on allocation over the costs which had been awarded by the Court, on further consideration, to a plaintiff legatee. The trade creditors of the business stand in the shoes of the executor, and are subrogated to his rights of indemnity and priority.

THIS was an action for the administration of the estate of William M'Glynn, deceased, brought by the plaintiff as one of the legatees under the will of the deceased, and also to have the defendants, who were the executors and trustees named in the will, removed from being such trustees, and for an injunction to restrain Edward M'Glynn, one of the defendants, from carrying on the business of deceased at the premises, Church-street, Clara.

By judgment dated 13th day of December, 1893, it was declared that notwithstanding the alleged exercise of the power in the will of said testator given to the defendants, the plaintiff was entitled to have accounts and enquiries made.

By judgment on further consideration, dated 29th April, 1889, the plaintiff was declared entitled to her costs incurred in the action out of the funds in Court, and a sale of the testator's business and farm, and an inquiry as to trade debts remaining unpaid at date of sale, was directed.

It appeared from the Chief Clerk's certificate that a considerable balance was due to the executor on foot of the accounts directed, and that at the date of the sale of the business premises the amount due to the trade creditors was £2130 6s. 9d. These

trading liabilities had been increased since the death of the testator.

The present application was made on behalf of Messrs. Ferrier, Pollock, & Co., Messrs. M'Master, Hodgson, & Co., and Messrs. Stewart & M'Donald, for an order that the defendant Patrick J. M'Glynn, as executor of the deceased, should be declared entitled to an indemnity payable out of the funds in Court standing to the credit of the action, so far as the said funds should extend in respect of the sum of £2130 6s. 9d., being the amount of the trade liabilities incurred by the said Patrick J. M'Glynn, remaining unpaid as found by the Chief Clerk's certificate, and for an order that such indemnity should on allocation rank as against the said funds in Court next after the taxed costs of the said defendant Patrick J. M'Glynn, and the taxed costs of the general solicitor, and in priority to any costs to which the plaintiff was theretofore, or might thereafter be, declared entitled in the action, and for an order that the applicants and the other trade creditors of the deceased mentioned in the schedule to the Chief Clerk's certificate should in respect of such indemnity be subrogated to the rights of the said defendant Patrick J. M'Glynn.

Barton, J.
1904.
MOORE
v.
M'GLYNN.

Herbert Wilson, K.C., for the creditors :—

The trading was authorised by the will as well as by the order of the Court. The order of the 29th April, 1899, does not affect the question of priority at all. The expenses incurred by a trustee in the execution of his office are treated by the Court as a first charge or lien upon the estate, and in a suit for administration of the property in respect of which the expenses have been incurred, the costs, charges, and expenses of the trustee will be paid even before the costs of suit : *Morison v. Morison* (1) ; *Exhall Coal Company* (2). If the trustees are authorised to carry on the business and employ certain specific property for the purpose, the creditors of the business have a right to the benefit of the indemnity and lien which the trustee has against the property devoted to the business : *In re Johnson* (3). But if a testator directs his trustees to carry on business without limiting them to the assets engaged

Barton, J. in his business, then the indemnity is chargeable against all the assets.
1904.

MOORE
v.
M'GLYNN. *Dowse v. Gorton* (1) and other cases could not have been so decided unless the indemnity given to the trustee covered his liabilities incurred in trading. See also Brett's Leading Cases in Modern Equity, notes to *Stott v. Milne* (2). The order on further consideration does not finally settle the question of priority. The effect of it is that the plaintiff is to get his costs out of the fund, provided prior claims have been first discharged: *In re Griffith* (3); *Gaunt v. Taylor* (4).

Denning, for the defendant, supported the contention of *Wilson, K.C.*

P. Fleming, K.C., for the plaintiff, relied on the order on further consideration declaring plaintiff entitled to her costs, and contended also that the words "costs, charges, and expenses" could not include the trading liabilities of an executor. He cited *Morris v. Latchford* (5).

May 6.

BARTON, J. :—

This is an application on behalf of Messrs. Ferrier, Pollock, & Co., and certain other trade creditors of the trade or business which was carried on under the authority of the testator's will, and by an order of the Court in the suit. The application is for an order declaring Patrick M'Glynn, the executor of the deceased in this matter, entitled to an indemnity payable out of the funds in Court in respect of the amount of the trade liabilities incurred by him in so carrying on the business, as found by the Chief Clerk's certificate; and that such indemnity shall on allocation rank as against the said funds next after the taxed costs of the executor and of the general solicitor, and in priority to the costs of the plaintiff; and that the applicants and the other trade creditors of the estate may, in respect of such indemnity, be subrogated to the rights of the executor.

(1) [1891] A. C. 190.

(2) 25 Ch. D. 710.

(3) [1904] W. N. 88.

(4) 2 Hare, 413.

(5) 23 L. R. Ir. 333.

The action is an old one, in which the primary decree was made so far back as December 13, 1893. The judgment of the Vice-Chancellor is reported in [1894] 1 I. R. 74. It is a legatee's suit for administration. By his will the testator bequeathed all his property to trustees for the benefit of his wife and children, with power to arrange for the settlement of his children as they might determine. The will also included a provision, the effect of which was to authorise the continuing of a trading business, and to authorise its continuance at the expense of the whole assets. Where a testator authorises his assets to be embarked in continuing a business, very serious considerations arise for everyone concerned in the estate. The executor is placed in a difficult position. He is personally liable to the creditors of the business, but with a right to be indemnified in respect of his liability out of the assets, in so far as he is not himself in any default. The creditors of the business are entitled to stand in the shoes of the executor and to be subrogated to his indemnity. It behoves a legatee or creditor in such a case to consider the position carefully before starting an administration action, because it may eventuate that the last state of the assets may turn out to be worse than the first. The result of the present legatee's action for administration has been that the plaintiff and the other legatees will receive nothing on foot of their legacies. The plaintiff was one of the children of the testator, and was offered, as her estimated share of the assets, a settlement of her claim, which, having regard to the character of the estate, seems to have been a substantial one. She, however, refused the offer, and commenced this action. She seems to have acted imprudently, as the estate has proved deficient. Nothing now remains for the plaintiff or the other legatees, and the question which I have to determine is as to the priorities for the purpose of allocation in view of the deficiency of the assets.

By his order on further consideration, dated April 27, 1899, the Vice-Chancellor declared the defendants entitled to their costs as executors' costs, and the plaintiff entitled to her costs, and one Bridget M'Glynn, an infant, entitled to her costs, payable to the general solicitor, the aforesaid costs "to be payable out of the funds to the credit of the action"; and the Court also directed the business to be sold, and a continuation trading account to be

Barton, J.
1904.

MOORE
v.
M'GLYNN.

Barton, J. brought in from the date of the last account to the date of the
1904. sale. This business had been previously carried on for several
MOORE years in obedience to directions in the will under the order of the
v. Court, and continued to be so carried on until the sale. The
M'GLYNN. premises have now been sold, and the estate has been realized.
It appears that in properly carrying on the trading the executor
had incurred certain liabilities in respect of which he is entitled to
be indemnified out of the testator's estate, and the creditors of the
business are entitled to stand in the executor's shoes, for the
purpose of enforcing that indemnity against the estate. The
executor is also indebted to the estate, but there is a considerable
balance due to him from the estate. The estate being deficient,
it is admitted that the executor's costs come first in order of
priority. Next to the executor's costs, no objection is made to
a small sum for costs being paid to the general solicitor, who
appeared, as I have already mentioned, for an infant. The
question arises between the executor's right of indemnity and
the plaintiff's costs. Nobody disputes the executor's right of
indemnity, or the creditors' right to stand in his shoes, or the
plaintiff's right to costs out of the funds in Court, if there are
sufficient funds in Court for the purpose. The question is this—
ought the executor's right of indemnity to take priority of the
plaintiff's right to costs?

Mr. Wilson argued that the executor's right of indemnity
constitutes a first charge on the assets being part of his "costs,
charges, and expenses" incurred in the execution of his trust.
He relied upon *Morison v. Morison* (1), where Turner, L.J., said,
at page 226:—"This right has priority over the costs of suit, for
as to the funds in the hands of a trustee, his expenses must be the
first charge on the fund." Mr. Wilson also referred to *Stott v.*
Milne (2), where, at p. 715, Lord Selborne, speaking of certain
costs incurred by trustees in actions which appeared to have been
brought *bona fide*, and to have been beneficial to the trust estate,
said:—"The right of trustees to indemnity against all costs and
expenses properly incurred by them in execution of the trust
is a first charge on all the trust property, both income and

corpus." Mr. Fleming, on the other hand, contended that trade liabilities incurred in carrying on a business cannot correctly be described as "costs, charges, and expenses." I understood him to suggest that the executor's right of indemnity in respect of liabilities such as these is a different kind of right from his claim for "costs, charges, and expenses" incurred in the execution of his trust, and that it would be more correct to say that it creates an equitable debt due from the testator's assets to the executor. I think it has been usual to regard these liabilities as part of the trustee's "costs, charges, and expenses"; but if they may be regarded as creating an equitable debt due to the executor from the assets, I do not see how that view could affect the executor's claim to priority over the costs of the legatee plaintiff. If the proceedings instituted by plaintiff have led to the creation of an equitable debt due by this estate to the executor, under his right of indemnity, ought this Court to allow the assets which are under its control to be paid away in satisfaction of plaintiff's costs while an equitable debt of that kind remains undischarged? By way of illustration, reference may be made to the priority which this Court is in the habit of recognizing in favour of another right of an executor, namely, the right of retainer in respect of debts due to him by the testator, as to which, in *Chissum v. Dewes* (1), which was a creditor's suit, Sir J. Leach, M.R., said that "the plaintiff was not entitled to have his costs satisfied out of a fund to which the right of retainer extended." However, I hardly think it necessary to pursue that topic. I am quite content to treat the executor's right, as it has usually been treated, as coming under the head of his costs, charges, and expenses in the execution of his trust and in the realization of the assets. I have no doubt that the executor's right of indemnity, in respect of liabilities properly incurred in carrying on this business in obedience to directions in the will and orders of the Court, creates a claim which, in so far as the executor is not in default to the estate, should be satisfied in priority to the costs of the legatee plaintiff. I may add that the plaintiff had not the carriage of the sale, and no question arises as to costs of sale, or as

Barton, J.
1904.
MOORE
v.
M'GLYNN.

(1) 5 Russ. 29, at p. 31.

Barton, J. 1904. to any particular item of costs to which any special consideration might be applicable.

MOORE
v.
M'GLYNN. Mr. Fleming finally took his stand upon the Vice-Chancellor's order on further consideration giving plaintiff her costs, and directing them to be paid out of the funds in Court. But my ruling as to priorities does not affect or go behind the Vice-Chancellor's order. The plaintiff is entitled to her costs out of the funds in Court, in so far as there are any funds available for her. She cannot get costs out of the funds if there are no funds, or if the funds are exhausted by claims which, under the rules and authorities which bind the Court, take priority in due course of allocation.

J. MAC M.

Appeal.
June 22.

The plaintiff appealed to the Court of Appeal.

Ignatius O'Brien, K.C., and *P. Fleming, K.C.*, for the appellant.

Herbert Wilson, K.C., and *A. C. Meredith*, for the respondents, the trade creditors.

Denning, for the executor.

THE COURT (Fitz Gibbon, Walker, and Holmes, L.JJ.) dismissed the appeal.

Solicitors for the creditors : *Larkin & Co.*

Solicitors for the defendant : *Hoey & Denning.*

Solicitor for the plaintiff : *Moriarty.*

R. D. M.

ALLISON v. JENKINS.

(1902. No. 477.)

M. R.

1903.

June 3.

1904.

March 16.

*Landlord and tenant—Action for recovery of land for non-payment of rent—
Salvage payment by sub-tenant—Contribution, principle of.*

Lands, held for ever subject to a fee-farm rent, were sold in lots in the Landed Estates Court. Six lots were made primarily liable to the head rent in certain proportions, and were bound to indemnify the remaining lots accordingly. Many years afterwards the head rent fell into arrear, owing to the default of the owners of some of the indemnifying lots to pay their proportion, and an ejectment for non-payment of rent was brought by the head landlord. The plaintiff, who was a sub-tenant of part of one of the indemnified lots, paid the rent and costs in order to save the lands from eviction, and claimed contribution from the owners of the several lots:—

Held, that the plaintiff was entitled to contribution on the principle of salvage, and that the owners of the lots should contribute according to the value of the lots at the date when the salvage payment was made.

MOTION FOR JUDGMENT.

This action was brought by Mrs. Margaret Allison and Thomas Fegan against Anna Eliza Jenkins and several others to enforce contribution by them towards the payment of arrears of head rent and costs paid by Mrs. Allison to the head landlords in order to save the lands in which the plaintiffs and the defendants were interested from eviction. The material facts of the case were as follows:—

Lands in the county of Donegal, known as the Bundoran estate, were held by Thomas Connolly under a fee-farm grant of October 31st, 1855, from the Provost, Fellows, and Scholars of Trinity College, Dublin, to Thomas Connolly, made pursuant to the Trinity College Leasing Act of 1851, subject to the yearly rent of £735 6s. 3d., or such other rent as might be substituted therefor, pursuant to the said Act, with powers of distress and entry in case of non-payment of rent, and covenants by the grantee to pay the said rent, or any rent to be substituted therefor, as aforesaid. The said rent was subsequently increased to £868 6s. 2d.

M. R.
1903.
ALLISON
v.
JENKINS.

Prior to this fee-farm grant Thomas Connolly and his predecessors in title held the Bundoran estate under a lease for years from Trinity College, which was renewed from time to time. Thomas Connolly and his predecessors in title sublet parts of the estate for terms of years and from year to year, reserving rents, and granted other parts of the estate to several persons, reserving fee-farm rents.

By order of the Landed Estates Court in Ireland of May 10th, 1865, made in the matter of the estate of Thomas Connolly, owner and petitioner, it was ordered that the Bundoran estate should be sold subject to the rent reserved by, and the covenants and conditions contained in, the fee-farm grant of 1855, and pursuant to this order the estate was put up for sale and sold in the said Court in thirty-nine lots, subject to the rent reserved by the fee-farm grant, and subject to certain conditions respecting the liability of purchasers of some of the said lots to pay the entire of the said rent, and to indemnify the purchasers of others of the said lots against the said rent. Some of the lots consisted of fee-farm rents, and others of lands let for terms of years and from year to year.

Six of the lots were sold primarily liable to the head rent of £868 6s. 2d. in certain proportions, viz. lots 27 and 34 were made primarily liable to £40 each, lots 36 and 39 to £100 each, lot 37 to £210, and lot 38 to the balance of the head rent, £378. The remaining lots were sold subject to the head rent, but indemnified against it by the six lots in the proportions above mentioned.

In the year 1899 the head rent payable to Trinity College fell into arrear, owing to the default of the owners of lots 34, 36, 37, and 38 to pay their proportion of it; and in June, 1900, an action for recovery of the estate for non-payment of rent was brought in the High Court of Justice in Ireland by Trinity College.

In October, 1901, the plaintiff Mrs. Allison, who was a sub-tenant of 5A. 1R. 14P. statute, part of lot 22, one of the indemnified lots, in order to save the estate from eviction, paid to the head landlords the sum of £2183 18s. 10d., being two and a half years' rent due up to May 1st, 1901, out of the estate under the fee-farm grant, and £100 costs, after deducting £86 16s. 7d. on account of income

tax. In January, 1902, Mrs. Allison applied to the owner of each lot for repayment of a proportionate amount of the sums so paid by her. This proportion was calculated by Mrs. Allison's solicitors on the value of each lot at the time of the sale in the Landed Estates Court, which was ascertained from the net profit rent derivable out of each lot as stated in the Landed Estates Court rental. Patrick Rafferty and Anna Eliza Jenkins, who were the owners of lots 27 and 39, indemnifying lots, paid to Mrs. Allison the proportion of the rent primarily charged on their lots, namely, the sum of £100 11s. 10d. and £251 10s. 6d. respectively. She also received from Thomas Fegan, who was afterwards made a co-plaintiff, the owner of lot 23, and from Emma Johnstone, who was afterwards made a defendant, the owner of lot 21, which were indemnified lots, the sums demanded of them by her, namely, £4 12s. and £7 11s. 9d. Nothing could be obtained by her from the owner of lots 36, 37, and 38, as the rents and profits of these lots were insufficient to pay the full amount of the head rent primarily charged thereon, and the premises comprised in these lots had no saleable value. This was at first denied by some of the defendants, but afterwards admitted by amendment. Johnston Teevan, the purchaser of those lots in the Landed Estates Court, charged them by his will with payment of certain life annuities, and an action by the annuitants, commenced in 1885, was pending in the Vice-Chancellor's Court, and a receiver had been appointed, and an order was made in that action giving the plaintiffs liberty to bring the present action. At the date of the purchase by Teevan, the lands comprised in the three lots, which were let to tenants, yielded a profit rent of about £400. After deducting the sums so received, the sum of £1819 12s. 8d. still remained due to Mrs. Allison, and on May 13th, 1903, she instituted this action, making Thomas Fegan a co-plaintiff, against the owners of the several lots. The plaintiffs submitted that the lands and other interests of the defendants held under the fee-farm grant were bound to contribute towards the repayment to Mrs. Allison of the sum of £1819 12s. 8d. so paid by her for the benefit of the Bundoran estate, and that the lands and other interests held under the fee-farm grant, other than the premises included in lots 36, 37, and 38, now owned by the

M. R.
1903.

ALLISON
v.
JENKINS.

M. R.
1903.
ALLISON
v.
JENKINS.

defendant John Byrne, were bound to contribute rateably to the repayment to her of so much of the arrears of rent as should have been, but were not, discharged by the premises comprised in lots 36, 37, and 38, and that the said sum so paid by her was a salvage payment made for the benefit of the said estate, and should be declared well charged on the premises comprised in the fee-farm grant, except so much as was vested in the plaintiffs or the defendant Emma Johnstone. They asked for an account of the payments they were compelled to make on foot of arrears of the said rent, and that the amounts so paid by them, together with the costs of the action, were well charged on the lands or interests of the defendants, other than Emma Johnstone, comprised in the fee-farm grant, and that the lands and other interests of the defendants held under the fee-farm grant, other than the premises vested in the defendant John Byrne, were bound to contribute towards the repayment to the plaintiff Mrs. Allison of the sum found to have been paid on the taking of the said account, and that (if necessary) an inquiry might be directed as to the respective proportions in which the said lands were respectively bound to contribute, with consequential relief.

The defendants Jenkins and Rafferty, owners of the indemnifying lots 39 and 27, put in a defence, admitting that they were bound to contribute the amounts demanded, and paid these sums into Court with interest from the date of payment by Mrs. Allison to the date of lodgment. They undertook to pay the costs of the action properly payable by them up to date, and submitted that they should not be made answerable for any further costs. The defendants Warnock, Wilson, M'Crossan, Scott, and Meehan, owners of indemnified lots, admitted their liability in the same way, and paid into Court with their defences the amounts demanded of them. Some of the other defendants, owners of indemnified lots, put in defences, and alleged that their lands were agricultural or grazing lands, and had diminished in value, and that other lots consisted of holdings in the town of Bundoran, upon which houses had been built since the time of the sale, and that these lots had increased in value, and they raised the question whether the contribution should be according to the present value of the lots vested in them, or according to the value thereof at the

dates of the sales in the Landed Estates Court, or according to the Poor Law Valuation thereof. The defendant Rose M'Mackin, owner of lot 34, put in an appearance, but no defence. She afterwards paid the sum of £100 11s. 10d., part of the rent primarily payable by her. The defendant John Byrne, owner of the defaulting and unsaleable lots 36, 37, and 38, put in no appearance. No disputed questions of facts were raised on the pleadings as amended, and the action came on for hearing on motion for judgment on admissions in the pleadings as against some of the defendants, and in default of appearance or defence in the case of other defendants.

M. R.
1903.
ALLISON
v.
JENKINS.

Chambers, K.C., Wilson, K.C., and Denning, for the plaintiffs.

Charles Brady, for the defendants O'Keeffe and M'Vittie :—

The values of the lots have altered since the sale in the Landed Estates Court; the value of agricultural and grazing lots, for the owners of which I appear, has diminished, and the value of other lots, which are holdings in the town of Bundoran, has increased. The question is at what date the value of the lots is to be taken for the purposes of contribution. The plaintiffs say at the date of the purchase, *i.e.* on the net profit rent to which each purchaser was entitled on the sale. I submit that the value of each lot should be taken at the date when the common danger arose and the salvage payment was made. There is no implied contract between purchasers in the Landed Estates Court to contribute *inter se* to the head rent, to which the property sold is subject, if the persons primarily liable to pay it fail to do so. The right of contribution in such a case is a mere equitable right, apart from contract. It is like general average contribution in the case of property lost at sea. The fact that the increase in the value of a lot is due to expenditure on it by the owner cannot make any difference. The matter, however, is not free from authority: see *Viner's Abridgment*, vol. 5, p. 561, title Contribution and Average, 3; *Seton on Decrees*, p. 2148. In *Heveningham v. Heveningham* (1), where two estates were liable to a portion, each had to contribute according to its value. So where a debt was due to the

M. R.
1903.

ALLISON
v.
JENKINS.

Crown out of several estates they had to contribute according to their rateable value: *Hartley v. O'Flaherty* (1). So in the case of contribution to renewal fines: *Hamilton v. Denny* (2).

P. Law Smith, for the defendants Fry, Ellis, and Hamilton.

My clients are owners of town lots which are said to have gone up in value. They ought to contribute according to the net rental at the time of purchase, not according to the value at the present time. They bought on the faith of the conditions and rental which were settled by the Court according to the practice stated in *Madden's* Land Judge's Practice, p. 235. It is really a question of contract.

Serjeant Dodd and *Donaldson*, for the defendants Jenkins and Rafferty.

Bird, *Chaytor*, *Edge*, *Horner*, *M'Loone*, and *Osborne*, for other defendants.

THE MASTER OF THE ROLLS:—

The plaintiff in this case is Margaret Allison, one of a large number of tenants holding property subject to a fee-farm rent of £868 6s. 2d. This rent had been let run into arrear, and in order to save the whole from eviction she paid the amount due to the head landlords. The action is brought by her to enforce contribution from the other tenants of the property subject to the fee-farm rent, some of whom hold under sub-fee-farm grants, and others are tenants from year to year. The first question to be determined is the principle on which the liability of the defendants to contribute is to be assessed, and the second question is that of costs. The property is situate near Bundoran, in the county of Donegal, and formed part of what was known as the Connolly estate, which was sold in the Landed Estates Court in the year 1868 and subsequent years. This property, which was called the Bundoran estate, was held under a fee-farm grant of October 31st, 1855, made by

(1) Beatty, 61.

and *Dering v. Winchelsea*, 2 Wh. &

(2) 1 Ball & Beatty, 199. [See also
Story's Equity Jurisprudence, s. 477,

T. 552, and cases there cited.—REP.]

the Provost, Fellows, and Scholars of Trinity College to Thomas Connolly, pursuant to the Trinity College Leasing and Perpetuity Act, 1851. The acreage of the Bundoran estate was about 2906 acres statute, and the rent reserved was £735 6s. 3d., subsequently increased, pursuant to the said Act, to £868 6s. 2d., at which amount it still remains. Prior to the making of this fee-farm grant the Bundoran estate had been held by the grantee and his predecessors in title under a lease for a term of years, with a covenant for perpetual renewal, which lease was renewed from time to time. Meantime sub-interests had been created, and at the time of the order for sale in the Landed Estates Court the Bundoran estate was held by a number of persons, some under sub-fee-farm grants, and others as tenants from year to year, the particulars of which tenancies are set out in the statement of claim. By the order for sale, which was made on May 10th, 1865, it was ordered that the estate should be sold subject to the rent reserved by, and the covenants and conditions contained in, the fee-farm grant; and pursuant to this order the estate was subsequently put up for sale.

An elaborate rental was prepared; some of the lots were sold rent free; others subject to parts of the said rent; and in the case of the lots sold rent free they were sold subject to the entire rent, but indemnified against it by other lots. This arrangement of course did not affect the rights of the head landlords to recover the rent out of any part of the lands, but only operated to relieve the purchasers of the lots *inter se*. It appears that some of the owners of the lots on which the rent was primarily charged allowed the rent to fall into arrear, and an ejectment for non-payment of rent was brought in June, 1900, by the head landlords. In order to save the estate from eviction, the plaintiff Margaret Allison, who is a sub-tenant on one of the lots, paid £2183 19s. 10d., being two and a half years' rent due up to May 1st, 1901, and £100 costs. The plaintiff then called upon the defendants, the owners of the different lots, to contribute towards this amount—some of them have done so, but the majority have not—and she alleges that £1819 12s. 8d. is due to her as a salvage payment for the benefit of the estate, and she asks to have the amount paid by her declared well charged on the lands vested in the defendants who have not contributed,

M. R.
1903.

ALLISON
v.
JENKINS.

M. R.
1903.
ALLISON
v.
JENKINS.

and, if necessary, for an inquiry as to the respective proportions in which the lands are bound to contribute. Some of the defendants have put in defences, but they do not deny the right of the plaintiff to get contribution from them, and the case comes before me now on motion for judgment. Three modes of contribution have been suggested; the first, which was suggested by the plaintiff's solicitors, was that each lot should contribute in proportion to its value at the time of the sale in the Landed Estates Court, calculated on the profit rent stated in the rental and the subject of conveyance in each case. The second was that contended for by Mr. Brady, who appeared for some of the defendants, whose lands were stated to have gone down in value, that the contribution should be in proportion to the value of each lot at the time the salvage payment was made, and the third was the Poor Law Valuation. I should have been very glad if the parties had agreed to a valuation such as the Poor Law Valuation, but there has been no such agreement come to. I cannot therefore adopt it. It comes to this, therefore—should the property be taken as of the value of to-day, or as of the year 1869? In many cases it would make no difference, unless there had been some organic change in the denominations. One would expect the ratio of one lot to another to be the same, though the valuation might be different. But a large expenditure might have been made on one lot, making it more valuable. Again, some of the lots are in the town of Bundoran, where the value of property is stated to have gone up, whereas the value of the property in the country parts is stated to have gone down; one would have expected the opposite. There has been a change in the relative value of the holdings.

I have not been referred to any authority on the subject; I cannot take it that the cases of contribution referred to by Mr. Brady have any direct application to the present case. The principle, however, I think, is, that when a person is interested in the preservation of property, and spends his money in preserving the whole of it for the benefit of himself and the others interested in it in circumstances like the present, they should contribute according to the value of the property at stake at the time the money is expended. It is analogous to the case of general average, where goods belonging to one person are jettisoned at sea to preserve the

ship and the rest of the cargo, or an extraordinary expenditure is incurred for that purpose; in such a case the owners of ship and cargo have to contribute according to the value of their respective property at the time. It was said: suppose a man builds a hotel on one of the lots, and spends £10,000 in building it, is it reasonable that he should pay according to the present value of his property which has been preserved, or on the value of the property at the time he bought it? This is of course an extreme case. If the case is to be treated on the principle I have stated, as I think it is, the value must be taken at the time the payment took place.

As there has been no agreement come to, there must be an inquiry.

The decree was as follows :—

“THIS COURT doth declare that the sum of £1819 12s. 8d., paid by the plaintiff Margaret Allison to the Provost, Fellows, and Scholars of Trinity College, Dublin, for arrears of rent due under the fee-farm grant of 31st October, 1855, in the pleadings mentioned, and for costs, constitutes a salvage payment, and is well charged with interest thereon at the rate of £4 per cent. per annum, on the lands and premises comprised in the said fee-farm grant, except so much of the said lands as are now vested in the plaintiffs or the defendant Emma Johnstone, and it is ordered that the following accounts be taken at Chambers, that is to say :—No. 1. An account of the payment the plaintiffs have been compelled to make to the said Provost, Fellows, and Scholars, on foot of the arrears of the said fee-farm rent, and which the defendants, or some of them, should have paid; and this Court doth declare that the amounts so paid by the plaintiffs, with interest at the rate aforesaid, are well charged on the lands or interests of the defendants, other than Emma Johnstone, comprised in the said fee-farm grant; and the Court doth declare that the lands and other interests of the defendants held under the said fee-farm grant, other than the premises lately vested in the defendant John Byrne, are bound to contribute towards the repayment to the plaintiff Margaret Allison of the sum which shall be found to have been paid by the said plaintiff on the taking of the aforesaid account, including so much of the said sum as represents arrears of rent primarily payable by the said premises lately vested in the defendant John Byrne. And it is ordered that the following inquiry be made at Chambers, that is to

M. R.
1903.
ALLISON
v.
JENKINS.

M. R.
1903.

ALLISON
v.
JENKINS.

say:—No. 2. An inquiry as to the respective proportions in which the said lands are respectively bound to contribute, having regard to the values of the several lots of the ‘Bundoran estate,’ in the statement of claim mentioned, at the dates of the said salvage payments; and the Court doth declare the defendants Anne Eliza Jenkins and Patrick Rafferty entitled to their costs of this action up to and including this hearing, when taxed and ascertained, the same to be paid by the plaintiffs, who are to be at liberty to apply to have the same over against the other defendants, or some of them, when taxed and ascertained; and this Court doth adjourn the further consideration of this action, and doth reserve all other costs.”

1904.

March 16.

The action came before the Court on further consideration of the Chief Clerk’s certificate. The Chief Clerk found that the net amount due to the plaintiff Mrs. Allison was £1731 4s. 8d., with interest at 4 per cent. per annum from October 31st, 1901, the date of payment by her to the head landlords. Evidence by affidavit was given before the Chief Clerk as to the values of the respective lots at the date the salvage payments were made; and the value of each lot at that date, and the amount which each lot was bound to contribute, were set out in a schedule to the certificate. The result was that the amounts lodged in Court by the defendants who paid money into Court were (with the exception of the defendant Scott) in excess of their proper contribution as found by the Chief Clerk. In the case of the defendant Scott the amount lodged by him was too little. A comparison of the amount originally demanded from the owner of each lot with the amount which the Chief Clerk found he was liable to pay showed in the majority of cases a considerable decrease, while a minority of cases showed a substantial increase, such decrease and increase being due to the depreciation and appreciation in value respectively of the different lots between 1869 and 1901. For example, the owners of lot 30, which was mainly house property in the town of Bundoran, who were originally asked to pay £83, were found liable to pay £525, and this out of a total of £1731. On the other hand, the property of the defendant Jenkins had considerably fallen in value, as shown by the fact that she was originally asked

to pay, and did pay, £341, whereas her proper contribution was but £110. Her lands were in the main agricultural, and some of them in the possession of tenants, whose rents were reduced by the operation of the Land Law (Ireland) Act, 1881, and other causes. The only question discussed on further consideration was the question of costs, which is fully dealt with in the judgment.

M. R.
1904.
ALLISON
v.
JENKINS.

The same counsel appeared.

THE MASTER OF THE ROLLS referred to his judgment on the primary hearing, and continued :—

I sent the case to Chambers to ascertain the contribution payable on the basis there laid down. The defendants do not all stand on the same footing. For practical purposes they may be divided into three classes. There are first the defendants Rafferty and Jenkins, as to whom I made a special order declaring them entitled to their costs up to the date of the primary hearing, to be paid by the plaintiffs. They gave the plaintiffs every assistance in the matter, and are practically in the position of co-plaintiffs. They paid their proportion of the rent for which they were liable before action brought, and agreed to contribute all they were asked to contribute to make good the default of the other owners, and have paid into Court more than enough to satisfy all claims against them. They will be entitled on allocation to get back the excess.

The next is the case of other defendants who have paid money into Court without previously having attempted to make any arrangement with the plaintiffs, as the defendants Jenkins and Rafferty did. They have admitted liability as regards the amount of contribution they were asked to pay, and in each case (save one, that of the defendant Scott) they have paid into Court more than the amount which they have been found liable to pay. As regards these defendants they are bound to contribute to payment of the plaintiff's costs up to the date of lodgment ; they must abide their own costs after that date, and will be entitled on allocation to get back out of Court any money paid in excess of their liability. The third class consists of those defendants, including Scott, who have not paid into Court enough in respect of contribution, or have not

M. R.
1904.

ALLISON
v.
JENKINS.

paid in anything at all. How are they to be dealt with? They must pay their proportionate part of the plaintiffs' costs, including the costs of the defendants Rafferty and Jenkins, paid to them by the plaintiffs pursuant to the judgment. These costs must be borne by them in proportion to the amount of contribution found by the Chief Clerk. There will be judgment against these defendants (except Scott) for the amounts so found, and against the defendant Scott for the deficiency; and in default of payment of these amounts and costs within two months an order for sale of their interests.

The decree was in the following terms:—

“UPON reading the judgment, dated the 3rd day of June, 1903, the Chief Clerk's certificate, filed the 20th day of February, 1904, the affidavit of James A. Denning, filed this day, and the Accountant-General's account, and upon hearing what was alleged by said counsel, this Court doth make no order as to costs against the defendants Anna Eliza Jenkins, Patrick Rafferty, and Emma Johnstone, and the Great Northern Railway Co. of Ireland; and it is ordered that the defendants Margaret Frances M'Crossan, Elizabeth M'Crossan, Hugh Thomas Warnock, Kathleen M. Wilson, Hazlett H. Wilson, and Patrick Meehan do pay the plaintiffs' costs of this action, when taxed and ascertained, up to and including the respective dates of lodgment by the said defendants respectively in Court of sums of money to meet the plaintiffs' demand, said defendants respectively to abide their respective costs since said dates; and this Court doth declare the plaintiffs entitled to their costs in this action, when taxed and ascertained, same to be paid by the defendants other than those specifically mentioned in the foregoing direction as to costs, and to include the plaintiffs' miscellaneous costs, properly and necessarily incurred in respect of the matters of business mentioned in the said affidavit of the said James A. Denning, and the costs paid by them to the defendants Anna Eliza Jenkins and Patrick Rafferty, in pursuance of the said judgment of the 3rd day of June, 1903; and it is ordered that all plaintiffs' said costs be paid by the several defendants hereinbefore directed to pay same, in proportion to the respective amounts of contribution payable by them, as ascertained by the second paragraph of the schedule to the said Chief Clerk's certificate; and this Court doth order that the plaintiffs do recover against the defendants respectively, other than those specifically mentioned in the foregoing direction as to costs, and the defendant James Hamilton

Scott, the sums set opposite to their names respectively in the said schedule to the said certificate, with interest on the said sums respectively at the rate of £4 per cent. per annum, from the 31st day of October, 1901, until the same shall be paid, and do recover against the defendant James H. Scott the sum of £13 4s. 7d., with interest thereon at the rate aforesaid from the 31st day of October, 1901, until the same shall be paid, and doth adjudge the same accordingly; and it is ordered that in default of payment to the plaintiffs within two months from this date by the several defendants respectively (other than those specifically mentioned in the foregoing direction as to costs, and the said James Hamilton Scott) of the amounts payable by them, as hereinbefore ordered and adjudged, or in default of payment by any of the defendants of the costs which they are respectively hereinbefore ordered to pay, the lands held by the said defendants so in default, set forth and described in the schedule hereunder within, shall be sold at such time and place by such person or persons and under such conditions of sale as shall be settled by the Judge at Chambers; and it is ordered that the funds in this action be allocated at Chambers to and amongst the parties respectively entitled thereto, and upon such allocation the defendants who have lodged in Court more than the amounts of their respective contributions shall be entitled to have the amounts so paid by them in excess repaid to them, and any of the said parties are to be at liberty to apply to the Court, as occasion may require."

M. R.
1904.

ALLISON
v.
JENKINS.

Solicitors for the plaintiffs: *Hoey & Denning.*

Solicitors for the defendants: *Henry & Son; Dane & Todd; Reid & Maguire; Alfred Stubbs; Francis Shields; King Houston; F. Sutton & Son; P. M. Gallagher; James Riordan.*

W. L.

M. R.
1904.

IN RE THE SECRETARY OF STATE FOR WAR AND
HURLEY'S CONTRACT.

Feb. 29.

(1904. No. 143.)

*Defence Acts—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18),
s. 119—Portion of lands held under lease—Apportionment of rent—Date
from which apportioned rent becomes payable.*

Portion of lands in the occupation of a statutory tenant was required by the Secretary of State for War for the purposes of the Defence Acts. Notice to treat was given, and the rent was apportioned by agreement, as provided by sect. 119 of the Lands Clauses Act, 1845 :—

Held, that the apportioned rent only was payable from the date of the agreement, although no entry had taken place.

Ball v. Graves (18 L. R. Ir. 224) followed.

SUMMONS.

This was an application on behalf of the Secretary of State for War, to determine the question from what date the apportioned rent of Anne Hurley, a tenant, part of whose lands had been required for the purposes of the Defence Acts, was payable.

Anne Hurley held part of the lands of Kilcolta, in the county of Cork, as statutory tenant, at the yearly rent of £41 12s., payable to the representatives of Maunsell Eyre.

By notice to treat under the Defence Act, 1842, and other Acts, dated December, 1902, the Secretary of State for War gave notice that he required to purchase the fee-simple of portion of the said lands in the occupation of the said Anne Hurley, and offered to treat and agree with the said Anne Hurley and the said representatives of Maunsell Eyre, and gave notice that, upon failure of agreement, he would have the purchase-money, compensation, or consideration settled pursuant to the said Acts, as amended by the Lands Clauses Act, 1860, and the Ranges Act, 1891 (54 & 55 Vict. c. 54), sect. 11. Section 11 of the Ranges Act, 1891, gives power to the Secretary of State for War to have the compensation payable for land acquired under the Defence Acts settled by arbi-

tration, pursuant to the Lands Clauses Acts. Arbitrators and an umpire were appointed to determine the compensation to be paid to the said landlord and tenant respectively. After the appointment of the arbitrators the solicitor for the Secretary of State for War, by letters of March 7th, 1903, addressed to the said landlord and tenant, proposed that the rent payable by the said tenant should be apportioned by agreement, pursuant to section 119 of the Lands Clauses Act, 1845, and that it should be apportioned by abating the said rent of £41 12s. by the sum of £14 11s. 2d.

M. R.
1904.
In re
WAR SECY. &
HURLEY'S
CONTRACT.

By letters dated March 12th and 13th, 1903, respectively, the solicitors for the said landlord and tenant agreed to the proposed apportionment of the said rent.

The arbitrators and umpire afterwards sat to determine the amount of the said compensation payable to the said landlord and tenant respectively, and it was agreed between the parties appearing before the said arbitrators and umpire that the award should be made on the basis of the rent payable in respect of the said tenancy being apportioned as aforesaid.

A form of agreement apportioning the said rent was approved of by the solicitors for the said landlord and tenant, but the parties did not agree to the date from which the said apportionment of rent was to take effect. This summons was accordingly taken out by the Secretary of State for War.

J. F. Vesey Fitzgerald, K.C. (*Cecil Atkinson* with him), for the Secretary of State for War:—

The Lands Clauses Consolidation Act, 1845, sect. 119, applies in the present case, and not the Railways (Ireland) Act, 1860, sect. 6: *Reg. v. Abbott* (1). Under the Railways (Ireland) Acts the tribunal appointed to assess the amount of compensation to be paid for lands taken and to apportion the rent is the same, namely, an arbitrator; under the Lands Clauses Consolidation Acts the tribunals are different—an arbitrator in the one case and two Justices in the other.

This is in default of agreement: sect. 119 provides that the apportionment may be settled by agreement, and if not so settled,

(1) [1897] 2 I. R. 362.

M. R.
1904.

In re
WAR SECY. &
HURLEY'S
CONTRACT.

such apportionment shall be settled by the Justices; "and after such apportionment, the lessee shall, as to all future accruing rent, be liable only to so much of the rent as shall be so apportioned in respect of the lands not required for the purposes of the Special Act."

The order of the Justices does not operate as an order made on a complaint, which takes effect at once, but as an award, the Justices being in the same position as an arbitrator: *Reg. v. Han-nay* (1); and the award is perfected by entry on the lands, which are not required till then. There are four sections of the Lands Clauses Consolidation Act, 1845, as to apportionment: sect. 98 (copyholds), sect. 112 (mortgaged lands), sect. 116 (rentcharges), and sect. 119 (leaseholds). In all these sections, except 119, it is plain that the apportionment takes effect only when the purchase-money is paid or the lands are entered on. It is submitted that in sect. 119 the apportionment only takes effect when the relation of landlord and tenant is interfered with, *i.e.* by entry of the promoters, and not before. "After such apportionment" means when required for the purposes of the undertaking, *i.e.* when possession is taken under sect. 19 of the Defence Act, 1842, the Secretary of State for War may obtain possession before compensation has been assessed. A considerable time may elapse between the making of the agreement or order of Justices, as the case may be, and the taking possession of the lands, with the result that if the apportionment takes place at once the tenant will be entitled to hold the lands to be taken free of rent. Again, the rent may be apportioned before the compensation has been assessed by the arbitrators, with the like result. There are two decisions on similar provisions of the Irish Railway Acts as to apportionment: *Ball v. Graves* (2) and *Callow v. Flynn* (3). *Ball v. Graves* (2) was decided on sect. 6 of the Railways (Ireland) Act, 1860, the words of which, for present purposes, are identical with those of sect. 119 of the Lands Clauses Consolidation Act, 1845, already referred to. The Exchequer Division there held that when a portion of lands held under lease was taken compulsorily by a railway company, and the rent apportioned by the arbitrators, the apportioned rent

(1) 23 W. R. 164. (2) 18 L. R. Ir. 224. (3) 26 L. R. Ir. 179.

only was payable from the date of the final award, although no conveyance was executed to the company, nor premises taken by them, until after the accrual of subsequent gales of rent. In *Callow v. Flynn* (1) all the lessee's lands were compulsorily acquired under a local Act, incorporating the Railways (Ireland) Act, 1851 (14 & 15 Viet. c. 70), and the arbitrator made an award, under sect. 9 of that Act, awarding, *inter alia*, that the rent should be wholly abated; but the compensation moneys payable thereunder to the lessor and lessee were not lodged in Court until a considerable time after the award. The Queen's Bench Division held that the lessor was entitled to recover the rent reserved by the lease from the lessee for the period between the date of the award and lodgment of the compensation in respect of the lessee's interest in Court, pursuant to the Railways (Ireland) Act, 1851. *Ball v. Graves* (2) was there discussed and distinguished by Murphy and Gibson, JJ., who did not approve of that decision. Gibson, J., says it is hard to see why, *a priori*, there ought to be any difference between an apportionment under sect. 6 of the Act of 1860, or under sect. 5 of that Act, or under sect. 98 of the Lands Clauses Act, 1845, to which I have already referred. It is submitted that *Ball v. Graves* (2) is not binding on this Court.

M. R.

1904.

In re
WAR SECY. &
HURLEY'S
CONTRACT.

Alexander Sullivan, for the tenant, was not called on.

There was no appearance for the landlord.

THE MASTER OF THE ROLLS:—

I am of opinion that *Ball v. Graves* (2) (with the decision in which I agree) is in point, and that I could not overrule it, whatever my own opinion might be. *Callow v. Flynn* (1) does not profess to overrule it. I think that the meaning of section 119 of the Lands Clauses Act, 1845, is plain, whether its operation may be just or unjust, and that the intention of the Legislature is clearly expressed. The material portion of the section is as follows:—"If any lands shall be comprised in a lease for a term of years unexpired" (which will include this case of a judicial tenancy), "part only of which lands shall be required for the pur-

(1) 26 L. R. Ir. 179.

(2) 18 L. R. Ir. 278.

M. R.
1904.
In re
WAR SECY. &
HURLEY'S
CONTRACT.

poses of the Special Act, the rent payable in respect of the lands comprised in such lease shall be apportioned between the lands so required and the residue of such lands." The Legislature is dealing with the mode of settling something which it calls an apportionment. The section goes on:—"And such apportionment may be settled by agreement between the lessor and lessee of such lands on the one part, and the promoters of the undertaking on the other part; and if such apportionment be not so settled by agreement between the parties, such apportionment shall be settled by two Justices."

Pausing here, it was argued that the apportionment might be something provisional or preliminary, so that the amount of the rent, when afterwards actually reduced, is to be treated as the apportionment intended from that time; but the section does not say that. The words are—"and after such apportionment the lessee of such lands shall, as to *all future accruing rent*, be liable only for so much of the rent as shall be so apportioned in respect of the lands not required for the purposes of the Special Act."

Apart from authority as to the meaning of the section, I should entertain no doubt that it contemplates a determination as to the amount of the altered rent to be paid, whether by agreement or by the decision of two Justices, and that such determination is the assessment contemplated. The settlement by two Justices, though it is not a judgment or order upon which execution can issue, yet is a decision by a competent tribunal that the "future accruing rent" is to be the amount settled by them. *Callow v. Flynn* (1), upon which Mr. Fitzgerald relies, was decided on section 9 of the Railways (Ireland) Act, 1851, which deals with a different subject-matter, namely, the amount of compensation to be paid in respect of land taken, and is couched in different language; and not upon the same section as *Ball v. Graves* (2), nor in respect of the same subject-matter. In *Ball v. Graves* (2) the Exchequer Division had to construe a section identical in terms (for present purposes) with section 119 of the Lands Clauses Act, 1845, namely, section 6 of the Railways (Ireland) Act, 1860. That section deals with apportionment of rent of lands under lease, when

(1) 26 L. R. Ir. 179.

(2) 18 L. R. Ir. 278.

part only of such lands is required, and provides that "If any lands shall be comprised in a lease for a life or lives, or for a term of years unexpired, part only of which lands shall be required for the purposes of the Special Act, the rent payable in respect of the lands comprised in such lease shall be apportioned between the lands so required and the residue of such lands; and such apportionment may be settled by agreement between the lessor and lessee of such lands on the one part, and the promoters of the undertaking on the other part; and if such apportionment be not so settled by agreement between the parties, such apportionment shall be settled by the arbitrator." The arbitrator is substituted for "two Justices" in section 119; in other respects the language is identical, both going on to provide that "*after* such apportionment the lessee of such lands shall, as to all future accruing rent, be liable only to so much of the rent as shall be apportioned in respect of the lands not required for the purposes of the Special Act." *Ball v. Graves* (1) no doubt was a case in which, as the law stood, the same tribunal, namely, the arbitrator, settled the apportioned rent under this section, and the compensation to be paid under section 9 of the Act of 1851. According to the usual practice in this country, both were settled by the arbitrator at the same time and in the same instrument, though no doubt they might have been included in different awards. There is a difference of procedure in the present case; but as to what is an apportionment of rent, and what is to be apportioned, and from what date, I can see no distinction between the two sections; they are, in my opinion, identical. I attach due importance to Mr. Fitzgerald's argument, but the award of the arbitrator is an assessment or apportionment of the rent, just as an order of two Justices would be, and therefore I cannot see any real distinction between the two cases.

But there is a great distinction between these sections and the section which was under consideration in *Callow v. Flynn* (2). Therefore I have two decisions—one, *Ball v. Graves* (1), which deals with the same subject-matter and an identical section; the other, *Callow v. Flynn* (2), dealing with a different section and a different

M. R.
1904.

In re
WAB SECT. &
HURLEY'S
CONTRACT.

(1) 18 L. R. Ir. 224.

(2) 26 L. R. Ir. 179.

M. R. state of things. Though the Judges of the Queen's Bench Division
 1904. in *Callow v. Flynn* (1) were apparently not enamoured of the
In re decision in *Ball v. Graves* (2), they could not, and did not, purport
 WAR SECY. & to overrule it. I am therefore of opinion that the time from
 HURLEY'S which the apportioned rent is payable runs from the date when
 CONTRACT. the apportionment is made, whether by agreement between the
 parties or by the order of two Justices.

Solicitor for the Secretary of State for War: *The Chief Crown
 Solicitor.*

Solicitor for Anne Hurley: *Maurice Healy.*

W. L.

M. R.
 1904.
 April 19, 27.

WRIGHT v. WRIGHT.

(1899. No. 427.)

*Will—Settlement—Gift to son—“ In the event of marriage to be put in strict
 settlement”—Form of settlement—Jointure—Executory trust.*

A testator devised real and personal estate to his son, and directed that in the event of his son getting married this property should be put in strict settlement. The son died, leaving a widow and three infant daughters, one infant daughter having predeceased him.

An action was brought to carry out the trusts of the will. A second infant daughter died before the hearing of an application for an order, declaring the rights of the parties:—

Held, that the two deceased daughters, having died before attaining age or marrying, could take no share in the property directed to be settled, and that the Court, in the exercise of its jurisdiction in carrying out the executory trust, had power to, and would, provide an annuity, by way of jointure, for the widow, and that, subject thereto, the property should be held in trust for the two infant daughters, in equal shares, as tenants in common in fee, on their respectively attaining twenty-one or marrying, and that in case one only should attain that age or marry, then the whole in trust for that one.

MOTION ON NOTICE.

By his will dated 6th day of April, 1895, Thomas Sibthorpe, after other dispositions, directed his trustees to pay the income of

his landed and house property and some personalty (after payment of life annuities) to his son Harry, "it being my express wish and direction that he shall not have any power to sell or incumber said property without the sanction of my said trustees, and in the event of my said son getting married, then I direct that this property shall be put in strict settlement."

M. R.
1904.
WRIGHT
v.
WRIGHT.

On the death of the testator in 1898, the trustees and executors of his will brought an action for administration of the real and personal estate. The order on further consideration was dated 16th April, 1902. Harry Sibthorpe married after testator's death, and died on 15th September, 1903, intestate, leaving a widow and three infant daughters, one child having predeceased him. Another child died after her father in the same year. The testator died seised of house and landed property held in fee simple, producing a net rental of about £475 10s. per annum, and a sum of £185 personal estate not specifically bequeathed.

An application was now made on behalf of Frances and Iris Sibthorpe, the two surviving infant children, by their next friend, for an order declaring the rights of the applicants in the properties devised and bequeathed by the will of the testator in the action to the plaintiffs upon the trusts therein declared for the testator's son Harry Sibthorpe, deceased, having regard to the direction in the said will contained, that in the event of the marriage of Harry Sibthorpe the said properties should be put in strict settlement, and for a declaration whether the widow of Harry Sibthorpe was entitled to any and what estate or interest in the said property, and whether any and what estate or interest in the said properties was vested in the two deceased children of the marriage, or either of them.

Oulton, K.C., for the applicants:—

The deceased daughters of Harry Sibthorpe having died before attaining twenty-one or marrying, took no share in the property directed to be settled. In *Walter v. Parrott* (1), where there was a direction to settle a legacy, the settlement was so framed as to make the fund divisible only among children who being sons should attain twenty-one, or being daughters attain that age or marry.

M. R. [THE MASTER OF THE ROLLS: I think that is so. That appears
 1904. — to be a stronger case than the present. There the fund was to be
WRIGHT “divided equally among the children.” In this case the property
v. is to be “put in strict settlement.”]
WRIGHT.

That being so, there remain two questions for decision—(1) Is the widow, Mrs. Sibthorpe, entitled to any estate or interest? and (2) In what manner, and for what estates, are the two surviving daughters interested?

As to the first question, there is no express authority. But on principle it would appear that a direction to put property into strict settlement does not afford any indication of an intention to include in the settlement a life interest for the wife, nor without express authority any power of jointuring. If, however, the Court decides it has jurisdiction, we raise no objection to some provision being made for the wife for her life or widowhood.

In cases directing settlement of property on a lady no provision is made for a husband. The cases are in a certain way analogous. In *Loch v. Bagley* (1), a testator directed the shares of his daughters to be “settled upon themselves strictly,” and Lord Romilly held that the income of each daughter’s share should be for her separate use without power of anticipation, then (if she died first) her share should go as she appointed, and in default of appointment to her next-of-kin, excluding her husband. See also *Duckett v. Thompson* (2).

In *Young v. Macintosh* (3) no provision was made for the husband.

[THE MASTER OF THE ROLLS: Do you know of any case in which, in execution of an executory trust by the Court, a life interest was given to a husband in a fund directed to be put in settlement on the wife?]

There is the case of *Charlton v. Rendall* (4), but that decision does not touch the present question, because in that case the trustees of the will had a discretion as to the manner of settlement, and the surviving trustee approved of the insertion of a power of appointment in the settlement enabling the wife by will to appoint a life estate to the husband. On that ground the

(1) L. R. 4 Eq. 122.

(2) 11 L. R. Ir. 424.

(3) 13 Sim. 445.

(4) 11 Ha. 296.

Vice-Chancellor approved of the introduction of this power into the settlement.

The other class of authorities deals with cases of the strict settlement of property, and the manner of executing an executory trust must be guided by the objects of the author of the trust, provided it be a legal one: *Sackville-West v. Viscount Holmesdale* (1); and powers diminishing the estate will not be introduced: *Higginson v. Barneby* (2). A power of jointuring is not a "usual power" within a direction in a settlement to insert usual powers, for it diminishes the estate, and there is no certain rule as to its quantum: *Hill v. Hill* (3); Farwell on Powers, 316.

In *Sackville-West v. Viscount Holmesdale* (1) it was held that on the proper construction of an executory instrument a power of jointuring might be inserted in a settlement. But the codicil there in question provided that the settlement was to be made with all such powers "as the trustees shall consider proper," and the absence of any mention of amount was not held to be an insurmountable difficulty, because the words of the codicil pointed to a settlement made by the will of the testatrix as the model to be followed, and this document specified the amounts of jointures with which tenants for life were allowed to charge the estates.

Hill v. Hill (3) shows the distinction between powers of management and enjoyment of settled estates and powers of jointuring and charging portions.

As to the second question remaining for decision—In *Grier v. Grier* (4) there was a covenant in marriage articles to settle an estate (after an annuity to the intended wife) "upon his issue" by the intended wife. It was held that this was a covenant for strict settlement, and prevented the husband from creating charges in favour of younger children, and that the limitations in favour of issue should be to the first and other sons successively, according to seniority in tail, remainder to the daughters in common in tail, with cross-remainders between them.

In the result the meaning of the clause under consideration is that the property was to be settled on Harry Sibthorpe and his children, and as Harry Sibthorpe has died, the property should,

M. R.
1904.

WRIGHT
v.
WRIGHT.

(1) L. R. 4 H. L. 543.

(2) 2 S. & St. 516.

(3) 6 Sim. 144, 145.

(4) L. R. 5 H. L. 688.

M. R. as to the real estate, be held in trust for the two minor children as
 1904. tenants in common in tail, with cross-remainders; and as to the
 WRIGHT personal estate, in trust for the same children, as tenants in
 v. common absolutely.
 WRIGHT.

G. A. M'Gusty, for Mrs. Sibthorpe:—

This is a purely executory trust, to be carried out by a settlement for which there is only a general direction; the Court can therefore exercise wide discretion in framing that settlement: see observations of Kay, J., in *Nash v. Allen* (1), and Lord Westbury in *Sackville-West v. Holmesdale* (2). A strict settlement is defined in Elphinstone's Introduction to Conveyancing to be a settlement of real property in the ordinary form, and such settlement always provides a jointure for an intended wife; in fact, provision for an intended wife is one of the primary objects of a marriage settlement, and may be said to be as much of the essence of a marriage settlement as a provision for the children. The reasoning of the Vice-Chancellor in *Duckett v. Thompson* (3) would therefore apply with equal force to making a suitable provision for a wife. Though no provision was made in that case for the husband of the lady whose property was settled, no application was made on his behalf, and the question does not appear to have been raised, nor are the cases of husband and wife analogous, for a husband is presumed to be capable of earning his livelihood, and is in a position after marriage to carry on his profession; but it is otherwise in the case of a woman who marries and bears children to her husband; nor are the cases consistent, for in *Charlton v. Rendall* (4) power to provide for a husband was in fact approved of by the Court. Though there is no case actually ruling the point raised here, *Sackville-West v. Holmesdale* (2) is in our favour, for a power to jointure was there inserted though the direction was that the land should be settled to correspond with the limitations of a barony. Such a power was declared by Lord Cairns to be for the honour of the settlement; and his judgment disposes of the argument formerly adduced that the difficulty of fixing the amount was a bar to inserting such a provision. The principle of jointure is to

(1) 42 Ch. D. 54.

(2) L. R. 4 H. L. 543.

(3) 11 L. R. Ir. 428.

(4) 11 Hare, 296.

enable the widow to live in reasonable comfort, having regard to her position in life, and the Court having full particulars of the property and circumstances of the parties, has material here to determine such an amount.

M. R.
1904.
WRIGHT
v.
WRIGHT.

H. Wilson, K.C., for the plaintiffs, cited *In re Dunnill's Trusts* (1).

THE MASTER OF THE ROLLS (having referred to the facts) said:—

April 27.

What is meant in this will by strict settlement? For the question is one of intention.

The characteristic feature of the present case is that the property directed to be settled is to be settled on a man.

Now what did this testator intend by ordering that property, real and personal, was to be put in strict settlement on the marriage of his son?

Where property is devised or bequeathed to be settled on a woman upon her marriage, the intention is to exclude the *jus mariti* as far as possible, and preserve the estate for her as separate estate at least during her life, and perhaps by making provision for her children after her death. Thus, while in *Lock v. Bagley* (2) "strict settlement" was held to mean simply exclusion of the right of a husband and every one else by treating the property as separate estate and nothing more, in *Duckett v. Thompson* (3)—a direction to settle the fund, the will plainly contemplating a marriage settlement—the Vice-Chancellor held that the testator must be deemed to have contemplated the ordinary trusts of a marriage settlement, and so to include trusts for children. In *Duckett v. Thompson* (3) the husband surviving made no claim to any interest, and the case was not discussed on the basis of any question of his rights. His rights, if he would have had any under the usual trusts of a marriage settlement of the wife's personalty, were thus waived by non-claim. The point is that the Vice-Chancellor held that a marriage settlement was intended, and that the very nature of such an instrument ordinarily imports a provision for children, relying for that proposition on the oft-quoted language of Sir E. Sugden in *Rochfort v. Fitzmaurice* (4).

(1) I. R. 6 Eq. 322.

(3) 11 L. R. Ir. 424.

(2) L. R. 4 Eq. 122.

(4) 2 Dr. & W. 1.

M. R.
1904.
WRIGHT
v.
WRIGHT.

The rule deducible from the authorities seems to be that in the case of an executory direction to settle a fund upon a woman, without more, the settlement will do no more than protect the legatee by making the fund separate estate; but when the intended settlement is expressed to be on her marriage, then the usual provisions of a marriage settlement will be introduced, even if no trust be specified save for herself. No case has decided that any provision for the husband will be included in an instrument to be framed under such a direction; though none, so far as I am aware, has decided that it would not. Instances of both these classes will no doubt be more rare when the Married Women's Property Acts apply, or are thought of.

But while the exclusion of marital control by means of the doctrine of separate estate is rational in the case of a woman, because the marriage at common law would otherwise transfer her property to her husband, no such principle can have application in the case of the husband's property, which is wholly unaffected by the marriage, save in the event of his dying intestate, in which case his wife might become entitled to dower or thirds, and to a share of his personalty, unless he chose to bar her rights. In other words, "strict settlement," in whatever sense the words are used, is meant to protect a wife's property for herself, and, therefore, usually to increase the dominion she would otherwise have over it; but in the case of a husband they can have no such effect or operation. A settlement must diminish and cannot increase a man's rights of ownership over the property settled by him.

When, therefore, property belonging (or given) to a man is ordered to be settled, it must be in order to diminish his power of dealing with it, by creating rights in others; and when this is done by a marriage settlement, the persons to be benefited would naturally be the children of the marriage, and, in almost invariable practice, the wife also. I hardly remember to have seen a marriage settlement of property coming from the husband's side which did not contain some provision for the wife, if surviving. The exceptions were, if I remember rightly, cases where the wife was otherwise provided for, or where a ward of Court, a minor, married a woman contrary to orders.

In short, I can give to this direction for strict settlement on

marriage no meaning unless I make it apply to a provision for wife and children.

A difficulty arises as to the nature and amount of the provision for the wife. That is, no doubt, a serious question; for in properly drawn settlements the wife's jointure is often left to be determined by an appointment, and no appointment here is possible, the husband being dead. But, having regard to the very special circumstances of the case—the death of the husband abroad—the utter absence of means on the part of the wife—I should be disposed to strain a point, if necessary, in the interests as well of the infant children as of their mother, by directing an inquiry as to what, under all the conditions, would be a proper, that is, a usual and reasonable provision for the wife, so long as she remains the widow of Harry Sibthorpe. In so small a case, however, I should be prepared to name the provision myself to save the expense of a reference, having before me all the materials for the purpose which would be available if there was a reference; and if no objection is made to my doing so, I will name £100.

On one point I must guard myself from being supposed to give a decision, as it has not been argued before me. That is as to the nature and extent of the estate which Harry Sibthorpe took under the will. I am not sure that he did not take an absolute interest, coupled with conditions and restrictions, void as being inconsistent and repugnant with such an estate. But the minors are two of his co-heiresses at law, and are, I think, heiresses of their sister, who died an infant. On their behalf, this suggestion, probably unsustainable, has not been advanced. My judgment, therefore, proceeds on the basis that the direction for a strict settlement is binding.

The Court ordered:—

“THAT the said estate, real and personal, shall belong to his (Harry Sibthorpe's) daughters, Frances Ellen Sibthorpe and Iris Myrtle Sibthorpe, in equal moieties, as tenants in common, on their respectively attaining the age of twenty-one years or marrying under that age; and if only one should so attain twenty-one or marry as aforesaid, then the whole to such one: the income in the meantime of the whole or part to be applicable to the maintenance and education of the said Frances Ellen Sibthorpe and Iris Myrtle Sibthorpe, respectively; but in each and every event aforesaid

M. R.
1904.

WRIGHT
v.
WRIGHT.

M. R.
1904.

WRIGHT
v.
WRIGHT.

subject to a reasonable and suitable provision, by way of jointure, for the said Ellen Sibthorpe, the widow of the said Harry Sibthorpe; and no party desiring a reference to ascertain what would be such reasonable and suitable provision as aforesaid, and the Judge being asked to decide on the facts before him what would be the extent of such reasonable and suitable provision by way of jointure in this case, the Judge doth declare £100 per annum would be a proper provision by way of jointure for said Ellen Sibthorpe, such allowance to determine on her death or second marriage, &c."

Solicitors for surviving children of Harry Sibthorpe : *Hayes & Son.*

Solicitor for Mrs. Sibthorpe : *W. J. Lundy.*

Solicitor for the plaintiffs : *M. Good.*

R. W. L.

Appeal. IN THE MATTER OF THE ESTATE OF HENRY LEADER,
1904. OWNER; MARGARET COLEMAN, PETITIONER (1).

June 10, 30.

Land Purchase Acts—Superior interest—Head rent—Redemption price—Principles on which to be assessed.

When lands subject to a superior interest, consisting of a fee-farm rent, have been sold to the occupying tenants through the Court, the redemption price of the rent is to be fixed at the price or sum which appears, upon due consideration of all the circumstances of the case—of the selling prices of similar interests, of the value of money, and of the fact that the redemption is compulsory—to be the fair value thereof; but the amount of the price ought not to be affected by the consideration of indemnifying the owner of the rent against loss of income by reason of the difference between the annual income of any investment or class of investments in which the redemption money might be invested.

APPEAL from an order of the Right Hon. Mr. Justice Ross, fixing the redemption price of a head rent issuing out of the lands sold in the matter to the occupying tenants.

The order appealed from recited the affidavit of Florence F. M'Carthy, and the rental in the matter, the attendance of counsel for the parties, and then proceeded—"it is ordered by the Court

(1) Before LORD ASHBOURNE, C., and FITZ GIBBON and HOLMES, L.JJ.

that the said rent described on said rental as apportioned, pursuant to the orders of the Irish Land Commission, dated respectively 17th May, 1893, and 6th March, 1900, to the sum of £94 9s., be redeemed, and it is ordered by the Court that the redemption price of the said apportioned rent be fixed at the price or sum equivalent to twenty-seven and a half years purchase of said apportioned rent."

Appeal.
1904.

In re
LEADER'S
ESTATE.

The affidavit of Florence F. M'Carthy, who was a member of a firm of solicitors acting for the petitioners having carriage of the proceedings, was filed in support of an application to redeem the head rent in question, and to have the redemption price thereof fixed by the Land Judge.

This affidavit stated that the lands of Clonmoyle east, containing 443 acres and 4 perches, statute measure, situate in the barony of East Muskerry and county of Cork, had been sold through the Court to the occupying tenants. At the date of the sale H. C. Atwool was in receipt of a superior head rent of £94 14s. 10½*d.* (which had been adjusted under the Local Government Acts to £94 9s. per annum), created by a fee-farm grant, dated 10th March, 1862, and made between Roland Davies and Thomas Perrier Davies of the one part, and Henry Leader (the owner in this matter) of the other part, in lieu of a lease for lives renewable for ever, of 5th May, 1787, in pursuance of the Renewable Leasehold Conversion Act. The rent reserved by this fee-farm grant had originally been £103 1s., but had been reduced on two distinct occasions when portions of the lands subject thereto had been sold through the Irish Land Commission, and the rent apportioned between the lands sold and the remaining lands, and the parts of the rent apportioned on the lands sold redeemed. On the first of these occasions (17th May, 1893), the fee-farm rent was reduced to £98 17s. 11*d.* On the second occasion (6th March, 1900), the fee-farm rent was further reduced to £94 14s. 10½*d.*, and had been adjusted at £94 9s. The affidavit also stated that the gross rental of the estate had been before the sale to the tenants £243 3s. 9*d.*; that the Poor Law Valuation was £203; that there were twelve tenants on the estate, ten of whom were judicial tenants for first statutory terms, and two of whom had held under leases from the Court which had expired, and had since continued in occupation;

Appeal.
1904.

In re
LEADER'S
ESTATE.

that the rate of purchase paid by the tenants was as follows :—
Two at eighteen and a half years purchase, two at twenty and a half years purchase, one at nineteen and a half years purchase, and the remaining tenants at nineteen years purchase.

The owner of the head rent asked thirty years purchase as its redemption price; the petitioner offered to consent to twenty-two years purchase.

The Land Judge fixed the redemption price of the head rent at twenty-seven and a half years purchase; and from this order the petitioner appealed.

Jellett, K.C., and C. W. R. Brady, for the respondent :—

There is a preliminary objection to the appeal. It is an appeal on a question of value; no such appeal lies. They cited the Land Law (Ir.) Act, 1887, sect. 16; Land Act, 1870, sect. 25; Land Law (Ir.) Act, 1881, sect. 48; Purchase of Land (Ir.) Act, 1885, sect. 22; Land Law (Ir.) Act, 1896, sect. 31 (4); Irish Land Act, 1903, sect. 64; Land Law (Ir.) Act, 1896, sect. 40.

THE COURT decided to allow the appeal to be heard.

Ignatius O'Brien, K.C., and Sugrue, for the appellant.

Jellett, K.C., and C. W. R. Brady, for the respondent.

June 30.

LORD ASHBOURNE, C. :—

This is an appeal from Mr. Justice Ross on his order fixing the price of a head rent.

This jurisdiction is vested by the Irish Land Act, 1903, in the Land Judge and Land Commission, and *prima facie*—without deciding against our jurisdiction—this Court would not interfere with an order of the Land Judge fixing the price. Here the order simply fixes the price, and is, on its face, correct and unimpeachable. Mr. O'Brien, however, for the appellant, stated that Mr. Justice Ross had—although the notice of appeal is silent on the subject—proceeded on an erroneous principle, and in support of this used a newspaper report of what occurred in the Land Judge's Court, of which Mr. Jellett, for the respondent, admitted

the substantial accuracy. This report leaves me in some doubt and uncertainty as to the precise grounds on which Mr. Justice Ross founded his judgment.

It is stated that the report indicates that he sought to indemnify the owner against any loss of income that might result if certain investments were made. It was also urged that another portion of the head rent was redeemed at a much lower price, and that there was nothing to indicate the reason for the discrepancy.

I do not at all say what should be the decision, or what should be the price. But I think it would be well to give the learned Judge an opportunity of reconsidering the case, and that it should be remitted to him for that purpose. He will, of course, consider all the circumstances of the case, the selling price of similar interests, the value of money, and the fact that the redemption is compulsory; and I think that the fair value should thus be reached without being affected by the consideration of indemnifying the owner, as may have been done according to the report.

Appeal.
1904.

In re
LEADER'S
ESTATE.

Lord
Ashbourne, C.

FITZ GIBBON, L.J. :—

The primary jurisdiction to fix the redemption price of superior interests, for the purposes of the Land Purchase Acts, is vested either in the Land Commission or in the Land Judge. To which Court the exercise of this jurisdiction falls in any particular case depends upon the way in which the estate has come into Court. In both cases the jurisdiction is the same, and the legal basis for fixing the price is also the same. It ought to be fixed in every case upon consideration of all the circumstances of the case, and of all matters affecting the value of the interest to be redeemed, and the result ought to rest upon legal evidence. It seems to me that the process and its result ought to be similar to what would occur in the case of a compulsory purchase of like property under the Lands Clauses Acts or the Railway Acts.

Without holding that this Court has not jurisdiction to fix the price upon an appeal, it certainly ought not to interfere with an order merely fixing a price unless it has reason to believe that the Court which is possessed of the primary jurisdiction to fix the

Appeal.
1904.

In re
LEADER'S
ESTATE.

Fitz Gibbon,
L.J.

price has acted upon some erroneous principle, or has been affected by some evidence, or supposed evidence, not legally admissible.

In the case before us, the superior interest in question was an apportioned part of an adjusted rent created by a fee-farm grant of March 10, 1862. It has been stated, and it is not denied, that the price of some other apportioned part or parts of the same rent had been fixed by the Land Commission before this case came into the Court of the Land Judge, at a number of years purchase considerably less than the twenty-seven and a half years purchase at which the Land Judge fixed the price of the rent dealt with by the order under appeal.

If this be so, both prices cannot be right. A great difference between the estimate of two tribunals exercising the same jurisdiction in respect of different parts of identically the same property, would rather tend to raise a presumption that both were wrong, and that the true price probably lay somewhere between them; but what the true price is, this Court cannot now decide.

Besides the discrepancy between the decisions of the two co-ordinate tribunals, the appellants rely upon a report, which the counsel on both sides have treated, so far as it goes, as a correct statement of the discussion which took place before the Land Judge; and it is contended that this discussion indicates that the estimate of twenty-seven and a half years purchase was erroneous.

From that report it would appear that the counsel on one side submitted that, having regard to the price that could be had for money in trust securities at the present time, the demand for thirty years purchase was unreasonable. This was met by counsel for the owners of the rent by stating that at thirty years purchase they would be losers of 10 per cent. on their income, which was fully secured at present. The Land Judge is reported to have said that he had consulted high financial authorities, and that the highest rate of interest he could get for £100 invested on trust securities was £3 8s. 6d.; that twenty-nine years purchase would bring the full amount of the rent if invested in securities at that rate, which he found could be got. The counsel for the owners of the rent answered that "there was nothing in the Land Acts that, as a result of a forced sale, the income for head rents should be reduced"; but if he had referred to the Land Act, 1903, s. 39, he

would have there found a case in which a loss of income from the investment of the redemption price of head rents was expressly contemplated, and was made the subject of compensation. When counsel for the owners of the estate pointed out that head rents had been redeemed in the Land Judge's Court at twenty-two and twenty-three years purchase, the Judge replied, "Under twenty-five years. That was at a time when you could get 5 per cent."

Appeal.
1904.

In re
LEADER'S
ESTATE.

Fitz Gibbon,
L.J.

It appears to me that the discrepancy between the estimate of the Land Judge and of the Land Commission challenges enquiry, and that it may be explained by the introduction into the factors of the Land Judge's result of the element of reduction of income arising from the difference between the amount of the rent and the annual income derivable from the class of securities upon which he assumed that the redemption price would be invested.

If this factor was introduced, it appears to me that its introduction involved a begging of the question. Stockbrokers, I believe, classify investments for certain purposes according to the rate of interest which they produce. A "3 per cent." security is higher than a "4 per cent." security in price or value. An estimate at twenty-five years purchase means an estimate that the property is a 4 per cent. security. Thirty-three and one-third years purchase indicates that it is a 3 per cent. security, and unless it be assumed that the intrinsic value or price of any given superior interest justifies its being estimated as equivalent to that of "trustee securities," giving an indemnifying redemption price would not be right. Having regard to the existence of the discrepancy, and to the fact of a discussion having taken place, which, so far as it weighed with the Judge in fixing the rate, if it so weighed at all, involved a *petitio principii*, I am not satisfied that the Land Judge fixed the figure at twenty-seven and a half years purchase upon legal evidence, or upon a correct principle of valuation.

Besides, different investments, authorised by the Act of 1903, vary in price and in rate of interest. Some owners are restricted to certain classes of investment; others can invest in whatever securities they think best; others can use the money for any purpose which they find most profitable. Accordingly, it is impossible to find any standard of value in speculations about the

Appeal.

1904.

In re
LEADER'S
ESTATE.Fitz Gibbon,
L.J.

results of investment upon any particular class of securities, as distinguished from the evidence of the value of money in general, which necessarily affects the price of every commodity.

Not presuming to anticipate the result of a reconsideration of the matter by the Land Judge, I think that it is our duty to remit the case to him for reconsideration, with the assistance to be derived from the expression of our opinions upon the questions of principle and of law which are involved in the fixing of redemption prices, and also with whatever assistance can be derived from the attempt which we are making to define those principles in the order which we now propose to make, viz. :—

“DECLARE that the redemption price of the rent in the said order mentioned ought to be fixed at the price or sum which appears upon due consideration of all the circumstances of the case—of the selling prices of similar interests, of the value of money, and of the fact that the redemption is compulsory—to be the fair value thereof; but that the amount of the said price ought not to be affected by the consideration of indemnifying the owner of the said rent against loss of income by reason of the difference between the annual amount of the said rent and the annual income of any investment or class of investments in which the redemption money might be invested. ORDER that the case be remitted to the Land Judge to reconsider the amount of the said redemption price, having regard to the foregoing declaration.”

HOLMES, L. J. :—

Although this Court has, in my opinion, jurisdiction to hear an appeal from an order of the Land Judge fixing the price of a head rent that must be redeemed under the provisions of the Land Purchase Acts, we ought not to interfere where the only question is one of amount involving no matter of legal principle. For some time I was disposed to think that the present appeal was of this class. There is nothing in the order of Ross, J., to indicate the contrary, differing in this respect from another order of his relating to the redemption of tithe rentcharge which was recently the subject of appeal. It has, however, been strongly argued that the learned Judge must have taken the view that the price was to be arrived at on the principle of indemnifying the owner of the head rent from loss consequent on redemption; and, although I

am far from satisfied that this was so, I fear that after the argument before the Land Judge and here, a simple affirmance of the order might lead to misconception. A newspaper report of the hearing before Ross, J., accepted by both parties as accurate, shows that counsel for the owner of the head rent pressed that the price ought to be fixed at a sum which, if invested in the best securities, would produce an income equal to the redeemed rent. Now, I am satisfied that this contention is erroneous. Redemption price must depend upon the marketable value of the head rent itself, and not upon the price of other securities. A purchaser of a head rent will probably compare the return he will get for his money with the return he might expect if he invested in British Consols, Chilian Bonds, gold mines, or in some commercial enterprise, and may be influenced by these considerations in making his bid. But the price he offers will not represent the value of other kinds of property, but the value of the particular kind of property he is seeking to acquire. Now, I cannot say that the Land Judge did not act on the true principle of market value, but it is at least doubtful. I find that he discussed the value of gilt-edged securities, with the result that he fixed the price far beyond that of another portion of the same head rent which was redeemed a few years ago, and in excess of any price given in his own Court for head rents sold therein. At least, I so understand his observations. For these reasons I think that the best mode of dealing with the appeal is what has been stated by my colleagues.

Appeal.
1904.

In re
LEADER'S
ESTATE.

Holmes, L.J.

Solicitors for the appellants: *Hanrahan & Co.*

Solicitors for the respondent: *E. and G. Stapleton.*

G. Y. D.

Appeal.
1904.

M'CAUSLAND v. O'CALLAGHAN (1).

May 10.
June 30.

Administration—Insolvent estate—Judgment creditors—Priority—Judicature Act (Ireland), 1877 (40 & 41 Vict. c. 57), sect. 28, sub-sect. 1.

In the administration of the assets of a person whose estate has proved insufficient to pay his debts, judgment creditors will be paid *pari passu*, and not in priority of time.

THE proceedings in this matter had been instituted to administer the assets of James Carnegie Shee by administration summons. The order for administration was dated on the 2nd March, 1903. The defendant was administrator with the will annexed, and the estate was insolvent. Under the posting for creditors, claims were sent in by two mortgagees.

1. A mortgage, dated the 12th July, 1878, by James C. Shee to Thomas Exham for £850. Thomas Exham died in 1899, and on the 23rd December, 1902, Henry Exham and A. H. Exham, the executors of Thomas Exham, recovered judgment against T. M. O'Callaghan, as personal representative of James C. Shee, in the King's Bench for £1,080, principal and interest due on foot of the mortgage.

2. A mortgage for £5600, dated the 5th June, 1879, by James C. Shee to the plaintiffs. The plaintiffs recovered judgment against the defendant, as personal representative of James C. Shee, on the 5th January, 1903, for £11,271 2s. 5d., the amount due for principal and interest on foot of the said mortgage.

On the claims coming before the Chief Clerk, he adjourned the case into Court to take the opinion of the Judge, as to whether the judgment obtained by H. and A. H. Exham against the defendant on the 23rd December, 1902, took priority over the judgment obtained by the plaintiffs on the 5th January, 1903.

On the 18th April, 1904, the Master of the Rolls decided that

(1) Before LORD ASHBOURNE, C., and FITZGIBBON, WALKER, and HOLMES, L.JJ.

the judgments ranked in priority according to their respective dates.

The plaintiffs appealed.

H. G. Richards, K.C., and *Macrory*, for the appellants:—

We submit that the rules of bankruptcy law apply, and that the judgments should be paid *pari passu*. Prior to the Judicature Act, the rule of Chancery practice was that such debts were payable according to their respective dates: *Dollond v. Johnson* (1). In Ireland judgment debts took priority, *inter se*, against real estates, according to their dates: *Burroughs and Gresson's Equity Pleader*, p. 348.

The question is how far the rules of bankruptcy have been brought in by sect. 28, sub-sect. 1, of the Judicature Act. They do not apply for the purpose of enlarging or diminishing the assets to be administered, but only for governing the mode in which they are to be divided. There are three classes of cases which illustrate this:—1. Whether rates and servants' wages should be paid in priority, as they are in bankruptcy? This is now regulated by the Preferential Payments Acts, 1888 and 1897; but the last decision before those Acts was that they were entitled to priority: *Re Association of Land Financiers* (2). 2. Whether, when money was lent by a married woman to her husband, she should be postponed to the other creditors by virtue of section 3 of the Married Women's Property Act, 1882. In England it was held that the married woman should be postponed: *Re Leng* (3). The Irish decision of *Moore v. Smith* (4) is inconsistent with this; but the question on which the Judges differed was the construction of the section of the Married Women's Property Act, and not the section of the Judicature Act. Lord Chancellor Walker, in giving judgment (p. 518), said that had he been unfettered by decision, he would have been disposed to uphold the contention of the appellant; but he considered the English authorities were the other way. *Re Leng* (3) was not then decided. 3. The executor's right of retainer is not taken away: *Lee v. Nuttall* (5).

(1) 2 Sm. & Gif. 301.

(2) 16 Ch. D. 373.

(3) [1895] 1 Ch. 652.

(4) [1895] 1 I. R. 512.

(5) 12 Ch. D. 61.

Appeal.
1904.
M'CAUSLAND
v.
O'CALLA-
GHAN.

But it has been held that the section applies, and the bankruptcy rules are brought in, in all those cases which deal with the mode in which the assets are to be divided: *Re Leng* (1). 1. The rules of set-off in bankruptcy are brought in, so that unliquidated damages may be set off against a liquidated debt: *Mersey Steel and Iron Co. v. Naylor* (2). 2. Voluntary debts rank with debts for valuable consideration as in bankruptcy: *Re Whitaker* (3). The decisions of *Smith v. Morgan* (4), and *Re Maggi* (5), must be considered as overruled by the decision in *Re Whitaker* (3). The principle for which we contend was conceded in *Re The Leinster Contract Corporation* (6).

McCarthy Mahony (with him *Connor, K.C.*), for the Messrs. *Exham* :—

The only division in bankruptcy is between secured and unsecured creditors; but it was not intended that the rights of third parties should be altered, or the rights of a class of creditors *inter se*. After the Judicature Act a limited construction was given to the section by the English Courts: *Smith v. Morgan* (4), and *Re Maggi* (5). These decisions were followed in Ireland. In England they have been, on the general question, overruled by *Re Whitaker* (3), and the question is whether this Court will follow the English decision. We do not argue this general question, as the present case is not ruled by these decisions. The statute says that the rule in bankruptcy is to apply. To make the section apply there must be a rule in bankruptcy corresponding with the rule of law. There is no such rule in bankruptcy, because there is nothing in bankruptcy corresponding to a judgment against a personal representative; so the section does not apply. Before the Judicature Act, the law was clear that judgments against the personal representative ranked in priority according to the dates at which they were obtained: *Williams v. Williams* (7). Moreover a judgment having been recovered against a personal representative is an admission of assets by him, on which he could

(1) [1895] 1 Ch. 652.

(2) 9 A. C. 434.

(3) [1901] 1 Ch. 9.

(4) 5 C. P. D. 337.

(5) 20 Ch. D. 545.

(6) [1903] 1 I. R. 517.

(7) I. R. 15 Eq. 270.

be made personally liable: Bullen and Leake (3rd ed.), p. 580. If the contention of the appellants be correct, the effect will be either that a third party's right would be affected, or that the plaintiff would be deprived of his rights against the third party.

Appeal.
1904.
M'CAUSLAND
v.
O'CALLAGHAN.
June 30.

Harley, for the defendant O'Callaghan.

LORD ASHBOURNE, C.:—

This is an appeal from the Master of the Rolls, and raises a question of importance in administration suits.

Mr. Richards, in opening the appeal, stated that he was seeking to change the Irish practice, and bring it into harmony with the practice now prevailing in England, and with the current of recent English decisions; and he has given the Court every assistance in his clear review of the authorities.

The question depends on the construction of section 28 (1) of the Irish Judicature Act of 1877 (corresponding with section 10 of the English Judicature Act, 1875). That section reads as follows:

“ In the administration by the Court of the assets of any person who may die after the commencement of this Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, . . . the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and to the debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt in Ireland.”

This section is not very felicitously drawn, and is susceptible of a narrow construction, and also, as pointed out in the authorities, of a wider construction. The earlier authorities before 1895 leaned towards the narrow, and against the wider, construction. In the case of *Moore v. Smith* (1), decided in December, 1894, this Court followed the case of *In re Maggi* (2), decided by Fry, J., and the then current of authority; but Lord Chancellor Walker, in giving the judgment of the Court of Appeal, said:—

“ I have felt considerable difficulty in this case, and if I considered myself unfettered by decision, I should be disposed to hold that the

(1) [1895] 1 I. R. 512.

(2) 20 Ch. D. 545.

Appeal.
1904.
M'CAUSLAND
v.
O'CALLA-
GHAN.
Lord
Ashbourne, C.

contention of the appellant is sustained by the wide language of the Acts in question; but, upon the whole, whatever my opinion might have been, if the application of the section of the Judicature Act were *res integra*, I think that I am acting more in harmony with the English authorities by accepting the interpretation of the section adopted by the Master of the Rolls."

A few months later, in March, 1895, the question came before the English Court of Appeal in the case of *In re Leng; Tarn v. Emmerson* (1); and then *In re Maggi* (2) was questioned and substantially overruled. Lindley, L.J., said, p. 656:—

"Fry, J., in commenting on sect. 10 of the Judicature Act, 1875, seems to have overlooked the words 'as to debts and liabilities provable.' Whilst I recognize the exceptions, I cannot myself go so far as to say that the general rule in bankruptcy, which requires debts (with some exceptions) to be paid *pari passu*, is not applicable in administration actions where the estate being administered is insolvent."

A. L. Smith, L.J., pointed out that as regards the distribution of assets there was no case which had decided that the rule in bankruptcy did not apply to the distribution of such estates.

This case went a considerable way towards laying down an authoritative construction; but the more recent case of *In re Whitaker* (3) states the position with unmistakable clearness. The head-note states:—

"The effect of sect. 10 of the Judicature Act, 1875, is to introduce into the administration of the estates of deceased insolvents by the Chancery Division the rule in bankruptcy that voluntary creditors are to be paid, *pari passu*, with creditors for value."

The facts of that case were not the same as the present; but it is one of the categories that we are dealing with. The Court was composed of Lords Justices Rigby, Vaughan Williams, and Romer—three most distinguished judges. Rigby, L.J., in giving judgment, said:—

"The question is whether, in the administration of an insolvent estate in the Chancery Division, the old and undoubted rule of the Court of Chancery, that creditors for valuable consideration took pre-

cedence over those whose debts were not founded upon a valuable consideration, must, notwithstanding sect. 10 of the Judicature Act, 1875, still prevail. In my opinion we cannot so hold. Section 10 provides (among other things) that the rules for the time being in force in bankruptcy as to debts provable shall apply in the administration by the High Court of the estate of a deceased insolvent. Upon the true construction of the words, I think they do not simply deal with the proof of debts. The same rules are to prevail 'as to debts and liabilities provable.' I cannot read those words as meaning simply 'as to the proof of debts and liabilities.' I think they mean that whatever general rules are in force in the Court of Bankruptcy for the time being with regard to debts and liabilities provable shall apply in the administration of insolvent estates in Chancery."

Appeal.
1904.

M'CAUSLAND
v.
O'CALLA-
GHAN.
—
Lord
Ashbourne, C.

Vaughan Williams, L.J., said :—

"One thing is quite clear, namely, that the section does not mean that in all respects the results of a bankruptcy, and the consequent administration of the estate, and the results of the death of an insolvent, and the consequent administration of his estate, are to be absolutely identical. It was long ago decided that, notwithstanding sect. 10, you must still apply only in bankruptcy those bankruptcy rules, whether statutory or otherwise, which go to augment the bankrupt's assets as against third persons. So far, it is plain that there is intended to be a distinction between bankruptcy and the consequent administration and death, followed by administration of the insolvent estate of the deceased. The section itself seems to me to point to an intention that the uniformity (if I may use the expression) shall be limited to some particular subjects, because it says 'the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively.' The section specifies four heads as to which uniformity is for the future to prevail. And in my view we have, in construing it, to determine what are the limits of the four heads specified, and then to see whether this rule of administration in Chancery, whereby voluntary creditors were postponed to creditors for value, is still to prevail. It seems to me that this rule of Chancery administration comes under the first of the four heads, namely, the rule in bankruptcy 'as to the respective rights of secured and unsecured creditors.' In my opinion, if these words are properly read, they do not mean, as Fry, J., in *In re Maggi* (20 Ch. D. 545), assumed that they do, only the respective rights of the two classes of creditors, secured and unsecured, as against each other, but that they include also the respective rights of those two classes *inter se*, and there can be no doubt that, as regards the rights of the creditors *inter se*, the

Appeal.
1904.

M'CAUSLAND

v.

O'CALLA-
GHAN.

Lord
Ashbourne, C.

rule in bankruptcy differed from the rule in Chancery. In bankruptcy, once given a provable debt, all the debts proved were entitled to payment of dividend, *pari passu*. In Chancery, a voluntary debt might be proved, but as regards payment of dividend it would be postponed to the creditors for value. It seems to me that under that section the rights of the creditors, *inter se*, must now be regulated by the bankruptcy rule, and not by the old Chancery rule."

The learned Lord Justice there indicates the difference between a narrow and a wide construction of the section, and gives his opinion in favour of a wide construction.

Then Romer, L.J., said :—

"The important words in sect. 10 for the purposes of this appeal are, I think, those which provide that the bankruptcy rules 'as to the debts and liabilities provable' shall prevail in the administration of an insolvent estate by the High Court. The section does not say that only the rules as to what debts and liabilities shall be provable are to prevail. It speaks of all rules 'as to debts and liabilities provable.' It appears to me that if there be a rule in bankruptcy that a debt shall be provable, but only in an inferior position to ordinary debts, that would be a rule 'as to' that provable debt within the meaning of the section. And so if there be a rule in bankruptcy that certain debts shall be provable, but in a superior position. And equally, to my mind, if the rule in bankruptcy be that certain debts and liabilities are provable in no superior or inferior position to ordinary debts, but *pari passu* with them, that would be a rule 'as to' those debts."

This case has naturally been followed, and states a clear and intelligible construction of the section, and what should be the consequent practice thereunder.

The Master of the Rolls sought to take the distinction that no bankruptcy practice applied, because it is not possible in bankruptcy for a creditor to obtain a judgment after adjudication, and that, therefore, a judgment as such could never have any effect in bankruptcy in such a case. The Master of the Rolls thus states his distinction :—"The section does not apply if at any time in the administration of assets there is a state of circumstances where one creditor could improve his position so as to be entitled to take precedence of other creditors. This cannot be done in bankruptcy, which levels all claims."

I do not follow this reasoning, and with deference I point out

that section 28 implies that there are differences between Bankruptcy and Chancery administration, and says that when those differences exist the rules of bankruptcy are to prevail. One of those differences relates to the position of judgments. In Bankruptcy all judgments are levelled, and paid *pari passu*; and I can see no reason why this rule should not here be applied under section 28.

Appeal.
1904.
M^cCAUSLAND
v.
O'CALLA-
GHAN.
Lord
Ashbourne, C.

In my opinion the construction of the section must be taken, since the case of *In re Whitaker* (1) at all events, as free from reasonable doubt; and assets should be distributed amongst creditors in the same manner that they would be in bankruptcy, judgment or no judgment, provided that the debt or liability is provable.

I accordingly think that the judgment of the Master of the Rolls should be reversed, and the appeal allowed with costs.

FITZGIBBON, L.J. :—

I concur with the Lord Chancellor.

WALKER, L.J. :—

The result of this case entirely depends on the view we take of the construction of the 28th section of the Judicature Act. The section is not very clearly framed, and different views have been taken of its construction.

In *In re Maggi* (2) Fry, J., gave a construction to it which would rule this case in favour of the respondent; and *Smith v. Morgan* (3) proceeded upon the same view.

The case of *Moore v. Smith* (4) in this Court did not raise precisely the same point as the one before us. In it we adopted the narrow construction of the section which had been applied in the cases which I then noticed in my judgment, and I considered myself bound by these decisions, though I stated that the wide language of the section might have justified a different view. But the same point was decided by the English Court of Appeal in *In re Leng*; *Tarn v. Emmerson* (5) in a different way; and if the case of *Tarn v. Emmerson* had been then reported, my decision

(1) [1901] 1 Ch. 9.

(2) 20 Ch. D. 545.

(3) 5 C. P. D. 337.

(4) [1895] 1 I. R. 512.

(5) [1895] 1 Ch. 652.

Appeal. would have been different. In *Tarn v. Emmerson* (1) the Appeal
 1904. Court overruled, in my opinion, the cases before Fry, J., and the
 M'CAUSLAND Common Pleas Division, to which I have referred.

v. This is made still clearer by the recent decision of *Re Whitaker* (2).
 O'CALLA- That was a conflict between a creditor under a voluntary deed, and
 GHAN. a creditor for value. Under the rule in Chancery, before the Judi-
 Walker, L.J. cature Act, such a voluntary creditor would be postponed to the
 creditor of value; but in bankruptcy both would be paid *pari*
passu, and it was decided that the rights of the creditors, *inter se*,
 should be regulated by the bankruptcy rule. It was pointed out in
 that case that there are limits to the application of the section. It
 does not mean that in all respects the results of a bankruptcy and
 consequent administration of the estate, and the results of the
 death of an insolvent and consequent administration of his estate,
 are to be absolutely identical. The uniformity is limited to the
 four heads specified, viz. the respective rights of secured and
 unsecured creditors, and as to debts and liabilities provable, and as
 to the valuation of annuities, and future and contingent liabilities.

It is settled now that the words "as to the respective rights of
 secured and unsecured creditors" include the respective rights of
 those two classes *inter se*, and a creditor with a judgment was
 paid in bankruptcy *pari passu* with one who had not got a
 judgment. Romer, L.J., points out—"The section does not say
 that only the rules as to what debts and liabilities shall be provable
 are to prevail. It speaks of all rules 'as to debts and liabilities
 provable.' It appears to me," he says, "that if there be a rule in
 bankruptcy that a debt shall be provable, but only in an inferior
 position to ordinary debts, that would be a rule 'as to' that prov-
 able debt within the meaning of the section; and so, if there be a
 rule in bankruptcy that certain debts shall be provable, but in a
 superior position. And equally if the rule in bankruptcy be that
 certain debts and liabilities are provable in no superior or inferior
 position to ordinary debts, but *pari passu* with them, that would be
 a rule 'as to' those debts."

Can it ~~make~~ a difference that it would not be possible in
 bankruptcy for a creditor to obtain a judgment after adjudica-

(1) [1895] 1 Ch. 652.

(2) [1901] 1 Ch. 9.

tion, and, therefore, the effect of the judgment as such could never be a factor in bankruptcy in such a case?

The Master of the Rolls in the judgment appealed against put his view in the following words:—"Here no person has obtained judgment against the deceased. Both judgments are against the personal representatives. One ranks in date before the other. Before you can apply sect. 28 to the case it must be plain that it is necessary first to have a bankruptcy rule analogous to the state of circumstances in which it is sought to be applied in a case of the administration of assets by the Court"; and later on he says:—"The section does not apply if at any time in the administration of assets there is a state of circumstances where one creditor could improve his position so as to be entitled to take precedence of other creditors. This cannot be done in bankruptcy, which levels all claims." Now all judgments, no matter when obtained, are levelled in bankruptcy, and paid *pari passu*.

I think the section has a wider scope than the Master of the Rolls has given to it, and that its true construction is that the assets shall be distributed amongst creditors in the same manner that they would be in a bankruptcy, *i.e. pari passu*, whether or not a judgment has been obtained in respect of one of them, and whatever be the nature of the debt or liability, provided it be provable. That principle, I think, underlies the decision in the case of *Re Whitaker* (1), and should be adopted.

HOLMES, L.J. :—

This is a controversy arising in a suit for the administration of the insolvent estate of a deceased man between two of his creditors, each of whom obtained a judgment for his debt against the administrator before the primary decree was made. The question is whether the judgments rank *pari passu*, or according to their respective dates. Before the Judicature Act the law was that the judgment first obtained was to be paid in priority to the other; and we have to decide whether this has been changed by section 28, sub-sect. 1, of the Irish Act of 1877, which is identical with

Appeal.
1904.

M'CAUSLAND
v.

O'CALLA-
GHAN.

Walker, L.J.

Appeal. section 10 of the English Act of 1875. The point arose in England
 1904. in 1880 in *Smith v. Morgan* (1), before Lindley, L.J., who held that
 M'CAUSLAND the priority of the judgment creditor in a case like the present
 v. was not affected by the provision above mentioned. The same
 O'CALLA- question was afterwards carefully considered by Fry, J., *In re*
 GHAN. *Holmes, L.J. Maggi* (2). "It turns," he says, "on the construction to be given to
 the words, 'the same rule shall prevail and be observed as to the
 respective rights of secured and unsecured creditors as may be in
 force for the time being under the law of bankruptcy with respect
 to the estates of persons adjudged bankrupt.'" He then proceeds
 to discuss what is meant by "the respective rights of secured and
 unsecured creditors." He thinks that these words are susceptible
 of two constructions. Either "the rights of secured creditors on
 the one hand, and of unsecured creditors on the other hand," or
 "the rights of secured creditors *inter se*, of unsecured creditors
inter se, and of the class of secured creditors as against the class
 of unsecured creditors." As between these constructions the
 learned Judge prefers the narrower, holding that the section
 relates only to the rights of secured as against unsecured creditors
 considered as two conflicting classes of creditors; but that it does
 not affect the rights of the members of each of the two classes
 between themselves. The necessary result of this construction was
 that he followed *Smith v. Morgan* (1): but I think if he had
 taken the other view of the section, he would have come to a
 different conclusion.

Subsequently the 10th section was examined by the Court of
 Appeal in England in *Re Leng* (3), and in *Whitaker's Case* (4).
 The class of creditors dealt with in these cases was different
 from those before the Court in *Smith v. Morgan* (1), and *In re*
Maggi (2); but they cannot be distinguished in principle. Great
 weight was given to a clause in the section to which Fry, J., did
 not refer—"The same rules as to debts and liabilities provable."
 The interpretation given to these words was that whatever general
 rules are in force in the Court of Bankruptcy for the time being
 with regard to debts and liabilities provable shall apply in the
 administration of insolvent estates in Chancery. It follows, I

(1) 5 C. P. D. 337.

(3) [1895] 1 Ch. 652.

(2) 20 Ch. D. 545.

(4) [1901] 1 Ch. 9.

think, from these decisions that as judgment debts are given no priority in bankruptcy, the same rule now applies in the administration of insolvent estates in Chancery. Lindley, L.J., who was one of the Court in *Leng's Case* (1), with a pardonable touch of human nature, thought that this decision was reconcilable with his own in *Smith v. Morgan* (2); but I think that this was not the opinion of the other Judges. It was certainly not the view taken in *Whitaker's Case* (3), in which, as Porter, M.R., says in *Re Leinster Contract Corporation* (4), "the Court, in terms as strong as I have ever seen where it was dealing with a decision previously regarded as clear law, overruled *Smith v. Morgan* (2) and *In re Maggi* (5)." Rigby, L.J., said, "We are not bound by these decisions, and if and so far as it is necessary (which probably means altogether), we must overrule them." Vaughan Williams, L.J., said, "I should have thought the decision of the Court of Appeal in *Re Leng* (1) was absolutely inconsistent with the decision of Fry, J., in *re Maggi* (5)." Romer, L.J., said, "*In re Leng* (1) can, I think, no longer be regarded as an authority."

Appeal.
1904.
M^cCAUSLAND
v.
O'CALLA-
GHAN.
Holmes, L.J.

The argument that there is nothing in bankruptcy analogous to a judgment against an administrator cannot be sustained. A debt or liability attaching to the assets at the date of the primary decree for administration corresponds with a debt or liability accrued at the time of bankruptcy. It is said that although the judgment in the first instance only affects the assets, it may be made available against the administrator personally, who would thereupon be entitled to be indemnified by the estate. The answer to this is that the administrator cannot be made liable by the judgment creditor after the decree. The remedy of the latter must then be pursued in the suit, and subject to the rules of administration.

Agreeing with the law as laid down in the latest decisions, I am of opinion that the appeal must be allowed.

Solicitors for the appellants: *S. S. & E. Reeves & Sons.*

Solicitor for the respondents: *Randal A. Howe.*

R. D. M.

(1) [1895] 1 Ch. 652.

(2) 5 C. P. D. 337.

(3) [1901] 1 Ch. 9.

(4) [1903] 1 I. R. 517.

(5) 20 Ch. D. 545.

Barton, J.
1904.

Feb. 24, 25.
March 25.

WELWOOD v. GRADY.

(1903. No. 387.)

Following assets—Claim on covenant in mortgage against legatee of mortgagor—Lapse of time—Proceedings in Land Judge's Court—Non-receipt of interest for many years—Intention to rely on security—Acquiescence—Alteration in position of legatees—Special circumstances disentitling mortgagees to relief against legatees.

The plaintiffs, W. and wife, were mortgagees of land for £1000, under a deed made in 1880, containing a personal covenant for payment. The plaintiffs made a submortgage to D. for £600, and subsequently took proceedings in the Land Judge's Court for the sale of the lands. An absolute order for sale was made in July, 1882, and in the following January a receiver was appointed. In the schedule of incumbrances D. was first mortgagee in respect of his submortgage for £600, and plaintiffs were second mortgagees in respect of £400, balance of their mortgage debt. The mortgagor died in January, 1887, having bequeathed certain farms and pecuniary legacies to his children, one of whom became his personal representative. The plaintiffs, in answer to statutory advertisements, in the same year gave notice of their debt. The estate of the mortgagor was distributed, and the legatees went into possession of the property bequeathed to them. After January, 1887, the plaintiffs received no interest on their mortgage debt. In April, 1889, most of the tenants offered to buy at seventeen years' purchase. The plaintiff W., in view of this offer, obtained leave to bid, and, in May, 1889, was declared the purchaser at £1100. He thereupon became ostensible owner in possession, dealing directly with the tenants, and endeavoured to effect a sale to them. Not being satisfied with the sum which the Land Commission offered to advance, he refused to proceed further with the sale, and, being unable to provide his own purchase-money, he was, in February, 1890, discharged from his purchase, the question of his liability for any deficiency on a re-sale being reserved. From September, 1892, no interest was received by D. or the first mortgagee; and, after the discharge of the plaintiff W. from the purchase in 1890, no step was taken until 1898, when the provisions of section 40 of the Land Law (Ireland) Act, 1896 (59 & 60 Vict. c. 47), were applied to the case. Three of the tenants, paying rents amounting to £15 a year, having refused to buy their holdings, in respect of which the Land Commission offered to advance £295, the plaintiff W. was allowed by the Court to become purchaser of the reversion of these three tenancies for £100, in order that the sales to the other tenants might be carried

out. The total amount thus realized by the sale of the estate was only sufficient to pay, besides costs, the principal and interest due on the first mortgage, leaving £400 for principal and more than £400 for arrears of interest due to W. and wife. In April, 1903, the plaintiffs brought an action against the personal representative and legatees of the mortgagor, claiming that under the personal covenant in the mortgage his estate, which had been distributed in 1887, was liable for the principal and interest then due on their mortgage. The personal representative did not defend the action :—

Held, that the plaintiffs were entitled to judgment against the personal representative, but that there were special circumstances in the case dis-entitling them to follow the assets which had been distributed, and that they were not entitled to relief against the legatees.

Ridgway v. Newstead (2 Giff. 492; 3 D. F. & J. 474) applied; *Leahy v. De Moleyns* ([1896] 1 I. R. 206) distinguished.

ACTION for a declaration that all the real and personal estate of John Grady, deceased, who died on the 4th January, 1887, having made a will by which he bequeathed certain farms and stock and pecuniary legacies to his children, was liable to discharge the claim of the plaintiffs as specialty creditors of the said John Grady under his covenant in an indenture of mortgage dated the 28th August, 1880; for inquiries what had become of his real and personal estate, and for an administration of the same, and consequential relief. The defendants were John Grady, a son and the administrator with the will annexed of the deceased, and the other surviving children and legatees under his will.

John Grady and a sister, one of the legatees, filed no defence. Those of the defendants who filed defences pleaded amongst other matters :—That the administrator with the knowledge of the plaintiffs in the end of 1887 distributed the assets; that the plaintiffs about the year 1881 entered into possession of the mortgaged premises; that by reason of their delay and neglect in the conduct of the proceedings for sale and of their mismanagement of the lands, the same remained unsold until 1900, and became depreciated in value, and the proceeds were insufficient to pay the mortgage debt; that the premises were put up for sale in 1889, and one of the plaintiffs, William Welwood, was declared the purchaser for a sum which would then have been sufficient to pay off the mortgage debt, interest, and costs; but by reason of the default of the said plaintiff, the sale was not completed, and he was dis-

Barton, J.
1904.

WELWOOD
v.
GRADY.

Barton, J. charged from his purchase, the Court reserving the question of
1904. liability for loss or deficiency on re-sale; that the plaintiffs' claim
WELWOOD was barred by their laches and acquiescence; that no claim was ever
v. made against the legatees until the year 1903; that the plaintiffs
GRADY. elected to rely on the security of the lands, though they knew the
value thereof was decreasing, and thereby obtained for many
years a high rate of interest, and when same ceased to be paid
regularly they did not inform the defendants or make any claim
against them; that interest ceased to be paid many years pre-
viously, and by the conduct of the plaintiffs the rights and position
of the defendants were altered, and they were prevented from
realizing the lands at the best price.

The following statement of the facts of the case is taken from
the judgment of Barton, J. :—

John Grady, of Curradrehid, in the county of Roscommon, by
deed of the 28th August, 1880, mortgaged the lands of Curra-
drehid containing about 140 statute acres to the plaintiffs to
secure the sum of £1000 with interest at $6\frac{1}{2}$ per cent. reducible to
 $5\frac{1}{2}$ per cent, if paid punctually. The plaintiffs made a sub-mort-
gage of the lands to a solicitor named Whitton for £600, who, in
his turn, in 1884, assigned the sub-mortgage to a Mr. Durdin. In
1882 the plaintiffs presented a petition for sale in the Land
Judge's Court, and in the proceedings in that Court there were
these two incumbrances—Mr. Durdin, the sub-mortgagee, being
first in order of priority in respect of his sub-mortgage, and the
plaintiffs next in respect of the balance of their original mort-
gage debt, *i.e.* £400. The absolute order for sale was made on
the 20th July, 1882, and Mr. J. W. Mullins, of Newlands, Clon-
dalkin, was appointed receiver over the lands on the 12th January,
1883. In the month of January, 1887, John Grady the mortgagor
died, and in that year his estate was distributed. The plaintiffs,
in answer to statutory advertisements, gave notice of their debt.
After the 1st January, 1887, the plaintiffs, who were second mort-
gagees, in point of priority upon the schedule of incumbrances,
ceased to receive any interest, and no interest was paid to them
from 1887 down to the commencement of the present action in
1903.

The sale of the lands in the Land Judge's Court was had

before Mr. Justice Monroe on the 3rd May, 1889. The rental and particulars showed a gross yearly rental at that time of £71 10s., and after deduction for tithe rentcharge, a net yearly rental of £67 16s. 8d., and a tenement valuation of £58 10s. The property was described as "being let at low rents to prosperous and industrious tenants." In April, 1889, eight of the nine tenants on the estate had made a proposal dated the 25th April, 1889, offering seventeen years purchase for their holdings. The plaintiff, Mr. Welwood, in view of this offer applied for and obtained the leave of the Court to bid at the sale. The leave was granted by an order dated the 1st May, 1889. At the sale upon May 3rd, 1889, Mr. Welwood bid £1100, and was declared the purchaser. From May 3rd, 1889, until February 28th, 1890, he remained the purchaser and ostensible owner of the lands in direct relation with the tenants, and he endeavoured to negotiate a sale to the tenants, who made offers which would have more than covered the £1100. The Land Commission in October, 1889, offered to advance £915, and Mr. Welwood, considering that the offer of the Land Commission was too small, refused to proceed further with the sale to the tenants. After this the solicitor having carriage pressed Mr. Welwood to complete the sale and to pay the purchase-money; but he was unable to produce for lodgment in Court more than £100 out of £1100. He apparently had expected that the first mortgagee would allow his mortgage debt of £600 to remain out on the security of the lands. The first mortgagee, when applied to, said that he had not undertaken to do so, and that he had made other arrangements which would render it impossible for him to entertain the suggestion. Under these circumstances the case had to be brought before the Land Judge again on the 28th February, 1890. Affidavits were filed and counsel was heard on behalf of Mr. Welwood. The Judge then made an order discharging Mr. Welwood from his purchase, and authorising the solicitor having carriage to advertise and receive private offers for a re-sale. The order concluded with the following reservation:—"The Court reserving any question of liability for loss and deficiency on re-sale." These facts all appeared in two affidavits of Mr. Whitton, the solicitor having carriage of the sale, and in the affidavit of the plaintiff Welwood, which was read upon the Judge's order. It

Barton, J.
1904.

WELWOOD
v.
GRADY.

Barton, J. appeared from one of the affidavits of the solicitor having carriage
 1904. of the sale, sworn and filed in February, 1890, that from the date
 WELWOOD of the order for sale to the plaintiff Welwood, the receiver had
 v. been instructed not to demand any rent from the tenants, the lands
 GRADY. being treated as the property of William Welwood, the purchaser. Meanwhile the condition of the estate became unsatisfactory. A memorandum made an exhibit by the receiver in March, 1890, showed that upon the yearly rental of about £70 there were at that time arrears due amounting to £369 16s. 6d. and costs due by the tenants amounting to £53 10s. From the 4th September, 1892, no interest was paid to the first mortgagee on foot of his mortgage. This appeared from an affidavit of Mr. Durdin filed 5th February, 1900.

After the discharge of Mr. Welwood from the purchase in 1890 until November, 1898, no step was taken in the proceedings in the Land Judge's Court. In the latter year Mr. Whitton, the solicitor having carriage, died, and by consent the carriage was transferred to Mr. Plunkett Kenney, solicitor for the Welwoods; and in the following year proceedings were taken under the 40th section of the Act of 1896. It appeared from the Land Commission report under the 40th section, filed 1st May, 1899, from an affidavit of plaintiff, filed 13th June, 1900, and from the order of the Land Judge, accepting proposals from a majority of the tenants, and cancelling the offers to three tenants, that the Land Commission offered to advance £1110 to the tenants, but three of the tenants refused to buy; their rental was about £15 a year, and the Land Commission had offered to them an advance of £295. In order to get the estate sold, it was arranged that Mr. Welwood should give £100 to purchase the reversion of the holdings of the three tenants who had declined to buy. As a result, the estate was, in 1902, sold for £954 7s. 4d., £815 of which was advanced by the Land Commission, £39 advanced by tenants in cash, and £100 paid by the plaintiff for the reversion of the three holdings which he purchased. The £954 7s. 4d. realised by the sale was barely sufficient to pay the mortgage debt, with arrears of interest and costs, of Mr. Durdin, the first mortgagee. There remained due to the Welwoods £400 principal, and about £430 for arrears of interest. There was also a considerable sum for costs—in all

at least £970. The Welwoods then commenced the present action as plaintiffs, relying upon the personal covenant in the mortgage of the 28th August, 1880, and seeking to follow the assets of the mortgagor into the hands of the legatees, among whom it had been distributed after the mortgagor's death in the year 1887. It was stated that the only assets remaining in the possession of any of the legatees was a farm which still remained in the possession of one of the sons to whom it had been bequeathed.

Barton, J.
1904.
WELWOOD
v.
GRADY.

Herbert Wilson, K.C., and William Byrne, for the plaintiffs.

C. A. O'Connor, K.C., Fetherstonhaugh, K.C., Hynes, and Denning, for defendants.

The following cases were referred to :—*Leahy v. DeMoleyns* (1) ; *Ridgway v. Newstead* (2) ; *Blake v. Gale* (3) ; *Beattie v. Cordner* (4), and same case in the House of Lords as *Harrison v. Kirk* (5) ; *In re Baker* (6) ; *In re Birch* (7) ; *In re McMurdo* (8).

BARTON, J. (after stating the facts as above, continued) :—

March 25.

When mortgagees bring an action of this kind upon the personal covenant in the mortgage, and seek to follow assets which have been distributed to beneficiaries, there is a broad distinction between the claim against the personal representative and the claim against the legatees. The claim against the personal representative is a legal claim, founded upon a legal right, and it can only be defeated by a legal defence. In the present case the personal representative has no defence, and offers no defence, and there must be judgment against him.

The claim to get back from the legatees the money or property which has actually been distributed amongst and received by them stands on an altogether different footing. It is an equitable claim, devised by the Court of Chancery in order to do justice to creditors. It has always been recognised that to such a claim

(1) [1896] 1 I. R. 206.

(2) 2 Giff. 492 ; 3 D. F. & J. 474.

(3) 32 Ch. D. 571.

(4) [1903] 1 I. R. 1.

(5) [1904] A. C. 1.

(6) 20 Ch. D. 230.

(7) 27 Ch. D. 622.

(8) [1902] 2 Ch. 684.

Barton, J.
1904.

WELWOOD
v.
GRADY.

equitable defences may be made; and it is well settled that the claim may be defeated if it can be shown that to enforce it would, under the circumstances of the case, conflict with the rules and principles of equity. In the House of Lords recently, in *Harrison v. Kirk* (1), this distinction was alluded to by Lord Halsbury at p. 4, and was very clearly stated and expounded by Lord Davey at pp. 7 and 8. That was a case of an administration suit with a general fund in Court, not yet fully distributed or appropriated. The House of Lords gave effect to the legal right of a mortgagee to have his mortgage debt discharged out of such a fund before its distribution amongst beneficiaries. But, in the passages to which I have referred, their Lordships recognised the distinction between the case before them and the case of an equitable claim against legatees after an estate has been distributed, or, in the case of a fund in Court, after sums have been carried to the credit, and appropriated for the payment, of legacies. Lord Davey upon that subject referred to and adopted the judgment of Stuart, V.-C., in *Ridgway v. Newstead* (2), a judgment which was affirmed by Lord Campbell, sitting as Lord Chancellor. In that case, where moneys in Court had actually been carried to the credit of and appropriated for the payment of legacies, the mortgagees were held to have lost their right to follow the assets by having for several years relied on their security with knowledge of its wasting character, with the result that the rights and position of the legatees had been altered. We have for our guidance in this country another case of high authority in which the Court of Appeal, upon a different state of facts before them, came to the opposite conclusion. I refer to the well-known case of *Leahy v. De Moleyns* (3). In that case the judgment of the Court was delivered by Walker, C., who, fully recognising the authority of *Ridgway v. Newstead* (2), distinguished the facts of the case before him from those of *Ridgway v. Newstead* (2), holding that there were no special circumstances of action or conduct to afford a ground for an equitable defence. The mortgagees in *Leahy v. De Moleyns* (3) were regularly paid their interest out of the natural fund for that purpose, and any alteration in the position of the

(1) [1904] A. C. 1.

(2) 2 Giff. 492; 3 D. F. & J. 474.

(3) [1896] 1 I. R. 206.

legatees was not caused by the mortgagees' conduct. The mortgagees sued the legatees as soon as they had any reason to believe that the mortgaged lands would not realise sufficient to satisfy their claim. There was no reason why they should sue sooner, and there was no ground for refusing them relief when they did sue.

In my opinion there are circumstances in the present case which make it inequitable for the plaintiffs to pursue this remedy against the legatees. In the first place, there is the remarkable fact that for more than fifteen years immediately preceding the commencement of this action the plaintiffs received no interest on their mortgage, and that, to their knowledge, for ten of those years the first mortgagee received no interest on his prior mortgage. Secondly, there is the circumstance that when the time arrived for the sale of the lands in Court in 1889, and when most of the tenants had offered to buy their holdings, Mr. Welwood, by leave of the Land Judge, was accorded the right of becoming a bidder for, and was, by order of May 3rd, 1889, declared the purchaser of, the mortgaged lands at a price which would have gone far at that time towards the payment of the mortgage debt. After remaining the purchaser for eleven months he was unable to produce his purchase-money, and, on failing to carry out his purchase, was relieved from his obligation—but only upon condition of being held liable to make good any deficiency which might accrue to the first mortgagee on a re-sale. Thirdly, we have the further circumstance connected with this incident, that, under the order of the Court of May 3rd, 1889, declaring Mr. Welwood the purchaser of the estate, he became and continued for nearly ten months, *i.e.* until the end of February, 1890, the ostensible owner in possession of these lands, dealing directly with the tenants, having displaced the control of the Court, and having to all appearance realised his security. Fourthly, we have the circumstance that for the eight years which followed this abortive sale no step of any kind was taken in the Land Judge's Court to realise the security of the land, or to have recourse to any other remedy, although the plaintiffs were receiving no interest, and although they might have had the carriage of the proceedings in the Land Judge's Court transferred to them as a matter of course,

Barton, J.
1904.

WELWOOD
v.
GRADY.

Barton, J.
1904.
WELWOOD
v.
GRADY.

for the purpose of having them expedited, if they had brought the delay to the attention of the Land Judge. Finally, when after twenty years in the Land Judge's Court the estate at last came to be sold, matters had come to such a pass that, in order to prevent the sale falling through, it became necessary to allow Mr. Welwood to become the purchaser of part of the mortgaged lands upon terms which apparently represented a very good bargain for him. It seems to me that these constitute a remarkable series of circumstances, with reference to which I only wish to add very few further observations.

The fact that interest was never received by the plaintiffs from the 1st January, 1887, to the commencement of this action in 1903, is a circumstance of much weight in a case of this kind. So long as a mortgagee receives his interest, legatees may consider it to be a harsh proceeding on his part to proceed against them. At all events they cannot afterwards complain if he has not done so. But if for a number of years after he has ceased to receive any interest the mortgagee refrains from resorting to his other remedy, the question may then arise whether his conduct does not amount to laches, and point to acquiescence in the distribution of the estate of the mortgagor. Lord Campbell, in *Ridgway v. Newstead* (1), said (p. 485), "I by no means say that, generally speaking, any laches can be imputed to a mortgagee who, during any period, however long, regularly receives payment of the interest of his mortgage money, if he quietly relies upon all the remedies which the law gives in respect of the mortgaged land, and of the personal liability of the mortgagor." Walker, C., in *Leahy v. De Moleyns* (2), quoted and adopted this passage at page 237, and at page 241 laid special stress upon the circumstance that, in that case, the mortgagees had been regularly paid their interest. He asks, "Would not it have been strange if the plaintiffs had sued on the covenant while they were regularly paid their interest?" Accordingly, I think that I am justified in saying that the non-payment of interest for so many years is a circumstance which goes far to distinguish the present case from *Leahy v. De Moleyns* (2).

(1) 3 D. F. & J. 474.

(2) [1896] 1 I. R. 206.

The facts connected with the abortive sale of the mortgaged estates in 1889 constitute another circumstance which, in a marked way, distinguishes the present case from *Leahy v. De Moleyns* (1). These facts deserve more than a passing reference. Seven years after the filing of the petition for sale the time came for the sale of the lands in the Land Judge's Court, pursuant to the order of the Court, and the sale was fixed to take place before Mr. Justice Monroe on the 3rd May, 1889. Most of the tenants were prepared to purchase their holdings, and made an offer to do so. Mr. Welwood, who in all the proceedings appears to have acted on behalf of his wife, who was his co-mortgagee, as well as on his own behalf, applied to the Court for leave to bid at the sale, which was granted by an order of the 1st May, 1889. When the sale came on, he made a bid for £1100, and was declared the purchaser. From that day—May 3rd, 1889—until February 28th, 1890, Mr. Welwood was the ostensible purchaser of the property, entitled to it as against all the world. It appears that during this period the Court control was suspended, and Mr. Welwood was in direct relation with the tenants. Assuming that down to that time the beneficiaries under the mortgagor's will ought to have remembered their liability to their testator's mortgagees, and ought to have been prepared to meet a claim from them, can the same obligation be attributed to them in the same degree after that date? Were they not justified in supposing that the mortgagees had realized their security, and that the legatees' liability was at an end? After Mr. Welwood had been declared the purchaser and owner, and had apparently gone into possession, dealing with the tenants as their landlord, were the legatees still to hoard their legacies, and to regulate their lives on the basis that they were liable to the mortgagees under the testator's personal covenant? Furthermore, Mr. Welwood appears to have availed himself of his position as purchaser to negotiate, and then withdraw from, a proposed sale of the estate from himself to the tenants at a price which was very much the same as that which twelve years afterwards had to be accepted on the occasion of the ultimate sale to them. He had been declared the purchaser at a sum which would have at

Barton, J.
1904.

WELWOOD
v.
GRADY.

(1) [1896] 1 I. R. 206.

Barton, J. that time gone far to discharge the liabilities of the estate. The
1904.
WELWOOD interest on the plaintiffs' mortgage had at that time only been in
v. arrear for two years, and the interest had been regularly paid in
GRADY. respect of the prior mortgage. In February, 1890, Mr. Welwood
was unable to complete the sale, and was discharged by the Court
on terms of reserving any question of liability for loss on a re-sale.
The Land Judge recognised in that way the equities as between
Mr. Welwood and the prior mortgagee. I think this incident also
gave rise to equities which I ought to recognise as between the
plaintiffs and the legatees of the mortgagor; and that it involves
circumstances and introduces considerations which are altogether
absent from the case of *Leahy v. De Moleyns* (1), or any of the
cases to which I have been referred. There are other special facts
in this case which I have already enumerated. But the circum-
stance of no interest having been received for so many years
before action brought, and the facts connected with the sale of
the estate to Mr. Welwood, his going into possession of the estate
as purchaser, and his release from the sale on terms after his
failure to complete—these are the elements which affect my mind
most strongly in the present case.

It is, of course, hard upon Mr. and Mrs. Welwood that they
should lose the whole of their mortgage debt, and I have no doubt
that the loss is a serious affair for them. But in view of the special
circumstances of the case, I have come to the conclusion that it is
not equitable for the plaintiffs to seek to recoup their losses from
these legatees. I agree that mere lapse of time, unaccompanied
by circumstances raising equities as between the parties, and
varying the rights and liabilities of the legatees, affords no bar to
equitable relief. But did not plaintiffs' conduct during all these
years amount to a representation that they were relying on the
security of the land; and, as a result of that conduct, have not the
rights and position of the legatees in the present case been altered?
If their rights and position have not been altered, they have little
reason to complain. If the circumstances have remained the same
since 1887, and if no detriment has resulted to the legatees, mere
lapse of time is no hardship. The case would upon that hypothesis

resolve itself into the simple case of a debtor who had to pay his debt sooner or later, being called on to pay it later instead of sooner. But I think the defendants' counsel were justified in saying that the position of the legatees has been seriously altered as the result of the circumstances which I have detailed at perhaps too great length. If it had not been for the intervention of Mr. Welwood and for his failure to carry out his binding agreement to buy the estate, the mortgaged lands might have been sold either to him or to the tenants at a time when there was no interest in arrear on the prior mortgage, and when the interest on the plaintiffs' mortgage and the costs were comparatively trivial. A sale at that time would have gone far to discharge the whole debt and the costs. As a result of all that plaintiffs did, and of all that in breach of legal obligation they left undone, the burden cast upon the legatees has been greatly increased by the accumulation of interest and costs for so many years. The legatees have been encouraged by the plaintiffs' proceedings in the Land Judge's Court to suppose that they would not be called upon to meet a claim of this kind. At the same time the ability of the legatees to meet such a demand has been weakened, and it appears that the whole burden would now fall upon one legatee who happens to retain a farm bequeathed to him by the mortgagor. There would be little chance of his being able to get any contribution from the pecuniary or other legatees who have spent or disposed of their legacies, and, as it seems to me, were not acting dishonestly in doing so, having regard to the attitude throughout the whole affair of the plaintiffs themselves.

For all these reasons I am of opinion that this case is distinguishable from *Leahy v. De Moleyns* (1), and is governed by the principles laid down in *Ridgway v. Newstead* (2). That being so, I must give judgment for the defendants who have appeared and defended this action; and the costs must follow the result.

Solicitor for the plaintiffs: *Plunkett Kenney*.

Solicitors for the defendants: *Philip C. P. MacDermot, John M. Whelan*.

D. M'C. M.

(1) [1896] 1 I. R. 206.

(2) 2 Giff. 492; 3 D. F. & J. 474.

Barton, J.
1904.
WELWOOD
v.
GRADY.

Appeal.
1903.

July 2, 3, 4.

LORD DEFREYNE *v.* FITZGIBBON AND OTHERS

(No. 1) (1).

(1902. No. 583.)

Practice—Chancery Division—Action charging conspiracy—Plaintiff seeking for injunction and damages—Trial of issues and assessment of damages by jury.

In an action charging several defendants with a conspiracy to compel the plaintiff to sell his property at a price below its value, by boycotting, threats, intimidation, and other unlawful means, the plaintiff sought to have the defendants restrained from doing the acts complained of by an injunction, and also asked for damages for the injuries already done. One of the defendants asked to have the issues of fact and the amount of damages ascertained and assessed by a jury:—

Held, by the Court of Appeal (Lord Ashbourne, C., and Walker and Holmes, L.JJ.), that having regard to the nature of the case, and the dates of the several proceedings therein, the action must be treated as substantially an action for unliquidated damages, and that it was a proper case in which, in the exercise of its discretion, the Court should direct the issues of fact and the amount of damages to be ascertained and assessed by a jury.

APPEAL from an order of the Right Hon. the Vice-Chancellor of Ireland dated the 29th June, 1903, refusing an application that the issues of fact in the action should be tried by a jury.

The writ of summons in this action named as defendants several Members of Parliament and other persons members of or connected with the United Irish League, and also a Limited Company, the proprietor of a newspaper called the *Freeman's Journal*. It was issued on the 13th June, 1902, and was indorsed as follows:—

“The plaintiff’s claim is to restrain the defendants, their agents, and servants, and all other members of the United Irish League, and all other persons combining and conspiring with them, from conspiring to injure and injuring the plaintiff.

(1) Before LORD ASHBOURNE, C., and WALKER and HOLMES, L.JJ.

1. By conspiring to compel the plaintiff to sell his property at a price below its value. (a) by unlawfully procuring or conspiring to procure the tenants of the plaintiff to conspire to break and to break their contracts with the plaintiff, and not to pay the rents which they were lawfully bound to pay; (b) by unlawfully conspiring to prevent by threats, intimidation, and boycotting, persons who were willing to enter into contracts with the plaintiff to take the lands of the plaintiff and to pay rents, from entering into such contracts and taking such lands; (c) by unlawfully conspiring by threats and menaces to prevent the plaintiff's land agent from performing his duty as such to the plaintiff, and to intimidate him from doing so, and by unlawfully inciting others to do the same; and by actual acts of violence to such agent, and incitement to same; (d) by unlawfully conspiring to boycott and intimidate, and by incitement to boycott and intimidate, and by actual intimidation and boycotting, to compel all tenants of the plaintiff who would not join in such conspiracy to join in same; (e) by watching and besetting the farms on the plaintiff's estate, and by libelling and picketing tenants about to pay their lawful rents, with intent to prevent them from so doing, and by conspiring to induce and inducing others to do the same.

Appeal.
1903.
—
DE FREYNE
v.
FITZGIBBON
AND OTHERS.

2. And for damages.

The defendants J. E. Redmond, M.P., John O'Donnell, M.P., David Sheehy, Laurence Ginnell, Alfred Webb, A. J. Kettle, Patrick White, Wm. O'Brien, Michael Davitt, John Dillon, M.P., E. Haviland Burke, M.P., John M'Inerney, Thomas Harrington, John Roche, M.P., J. P. Farrell, M.P., Dr. Mulcahy, J. G. Swift MacNeill, M.P., Alderman Farrell, Joseph Delahunt, John Muldoon, and Richard M'Ghee, are members of the standing committee of the United Irish League, and are sued on behalf of, and as representing, all the members of the said United Irish League.

The defendants John O'Donnell, M.P., and John Dillon, M.P., are sued personally, as well as representing, and on behalf of, all the members of the United Irish League."

Immediately after issuing the writ, the plaintiff served notice of motion for an interlocutory injunction. The motion was listed for hearing in the month of July, but, owing to the state of the

Appeal. Vice-Chancellor's list, was not heard before the Long Vacation in 1903. 1902. It was not re-entered in the following sittings.

DEFREYNE

v.
FITZGIBBON AND OTHERS. The plaintiff delivered his statement of claim on the 18th February, 1903, to the following effect :—

“1. The plaintiff is the owner of large estates, the greater portion of which is situate in the counties of Sligo and Roscommon, and the residue in the county of Galway. The said estates comprise 1788 holdings, in the hands of 1692 occupying tenants, whose gross annual rental amounts to £11,572. Judicial rents have been fixed upon 911 holdings, and a considerable portion of the plaintiff's said estates is let annually by the season for grazing purposes only. The plaintiff's tenants paid their rents with reasonable punctuality up to the year 1901.

2. In or about the year 1898 an organisation styling itself The United Irish League was founded, amongst the objects of which are, as stated in its ‘Constitution,’ the abolition of landlordism in Ireland by means of a universal and compulsory system of sale of the landlord's interest, together with the reinstatement of tenants evicted in connection with the Land War, and the restoration to the legal status of tenants of caretakers and future tenants whose rights were sacrificed by the operation of the 7th section of the Land Act of 1887; the putting an end to periodical distress and famine in the West by abolishing on terms of just compensation to all interests affected the unnatural system by which all the richest areas of that region are monopolised by a small ring of graziers, and restoring the people to the occupation of these lands in holdings of a sufficient size and quality; the restitution to Ireland of the amount by which it is overtaxed, and the appropriation of the accumulated amount to such uses as facilitating the abolition of landlordism throughout Ireland, the redistribution of the non-resident grazing ranches of Connaught, and the reinstatement of the evicted tenants. The membership of the United Irish League is very numerous, and it is impossible to sue all the members individually. It has branches all over Ireland, but its operations are controlled and its funds administered by a head executive called the standing committee of the National directory. By this body the supreme government of the United

Irish League is carried on, and it meets annually to elect the officers of the League. The defendant John E. Redmond is the president of the said United Irish League; the defendants John O'Donnell, David Sheehy, and Laurence Ginnell are its secretaries; the defendants Alfred Webb, A. J. Kettle, and Patrick White are its treasurers; and the defendants John E. Redmond, William O'Brien, Michael Davitt, John Dillon, E. Haviland Burke, John MacInerney, Thomas Harrington, John Roche, J. P. Farrell, Dr. Mulcahy, J. G. Swift MacNeill, Alderman J. J. Farrell, Joseph Delahunt, John Muldoon, and Richard McGhee are members of the standing committee. The said defendants control the operations and funds of the organisation, and adequately represent the entire body of its members for the purpose of this action. The defendant, Bernard Harte, is president of the branch of the said League established at Frenchpark, on the plaintiff's estate; the defendant Denis Johnston is a paid organiser of the said League; and the defendants John Fitzgibbon, Patrick Webb, Owen McGarry, John Cullinan, Conor O'Kelly, and William Duffy are members of the said League.

Appeal.
1903.
—
DeFREYNE
v.
FITZGIBBON
AND OTHERS.

3. The defendant company is the proprietor and publisher of the newspapers called the *Freeman's Journal* and the *Evening Telegraph*.

4. In the year 1901 the defendants, with intent to injure the plaintiff, wrongfully and maliciously conspired together to compel him to grant to his tenants a permanent abatement of 6s. 8d. in the £ sterling upon the rents which they had contracted, and were legally bound to pay to him; and also to compel the plaintiff to sell his estates for prices less than their true value to the occupying tenants thereon.

5. In furtherance of the said conspiracy the defendants unlawfully and maliciously procured and conspired to procure the tenants of the plaintiff to conspire to break and to break their contracts with the plaintiff, and to refuse to pay and not to pay to the plaintiff or his agent the rents which the said tenants were and might become lawfully bound to pay, and which the plaintiff was or might become lawfully entitled to be paid under the contracts of tenancy between him and his tenants.

6. In furtherance of the said conspiracy the defendants unlaw-

Appeal.
1903.
DEFREYNE
v.
FITZGIBBON
AND OTHERS.

fully and maliciously conspired to prevent and did prevent by threats, intimidation, and boycotting persons who were willing to enter into contracts with the plaintiff to take the plaintiff's lands, and pay him rent therefor, from entering into such contracts, and from taking such lands.

7. In furtherance of the said conspiracy the defendants unlawfully and maliciously conspired to boycott and intimidate, and to incite others to boycott and intimidate, and did unlawfully and maliciously boycott and intimidate, and incite others to boycott and intimidate, those tenants of the plaintiff who were unwilling to join in the said conspiracy, in order to compel all tenants of the plaintiff to join in the same.

8. In furtherance of the said conspiracy the defendants unlawfully and maliciously conspired to watch and beset, and to incite others to watch and beset, and did unlawfully and maliciously watch and beset, and incite others to watch and beset, the farms on the plaintiff's estate belonging to tenants who were about to pay to the plaintiff their lawful rents, with intent to prevent and did prevent them from so doing.

9. In furtherance of the said conspiracy the defendants unlawfully and maliciously conspired to libel and to incite others to libel, and did libel and incite others to libel, tenants of the plaintiff who were about to pay their lawful rents, with intent to prevent and did prevent them from so doing.

10. In furtherance of the said conspiracy the defendants unlawfully and maliciously conspired to picket and beset, and to incite others to picket and beset, and did picket and beset and incite others to picket and beset, tenants of the plaintiff who were about to pay their lawful rents, with intent to prevent and did prevent them from so doing.

11. In furtherance of the said conspiracy the defendants unlawfully and maliciously conspired to deter and prevent, and to incite others to deter and prevent, and did deter and prevent and incite others to deter and prevent, by boycotting and intimidation persons other than tenants who had been lawfully evicted from their holdings upon the plaintiff's estate for non-payment of rent from taking or occupying as tenants, and from cultivating or working for the benefit of the plaintiff, any of the said holdings.

12. In furtherance of the said conspiracy the defendants unlawfully and maliciously conspired to coerce and to incite others to coerce, and did coerce and incite others to coerce, by boycotting and intimidation tenants and persons in occupation upon the plaintiff's estates, from which previous tenants thereof had been lawfully evicted for non-payment of rent, to quit and deliver up the holdings so taken or occupied by them.

13. In furtherance of the said conspiracy the defendants unlawfully and maliciously conspired and endeavoured, and incited others to conspire and endeavour, to prevent by threats and menaces and by actual violence and incitement thereto the plaintiff's land agent from performing his duty to the plaintiff in that behalf.

14. In furtherance of the said conspiracy the United Irish League organised a number of meetings which were held upon or in the immediate vicinity of the plaintiff's estates, and at which members and officials and organisers of the said United Irish League, speaking in their capacity as such members, officials, and organisers, and on behalf of the entire body of members, advocated the cause of the said conspiracy, and the several unlawful acts set forth in the preceding paragraphs numbered 5 to 13, inclusive.

15. The newspapers called the *Freeman's Journal* and the *Evening Telegraph* are the principal organs of the United Irish League, and from time to time during the years 1901 and 1902 published, with intent to further the objects of the said conspiracy, reports of the speeches delivered by the defendants and others, at the meetings in the preceding paragraph mentioned, and also editorials and articles in support of the said conspiracy, and inciting the plaintiff's tenants to join in and support the same, and advocating the several unlawful acts set forth in the several preceding paragraphs numbered 5 to 13, inclusive.

16. The plaintiff intends to rely upon the following matters (*inter alia*) in proof of his case.

[The statement of claim here set out particulars of meetings and the proceedings thereat at which several defendants attended, and at which they spoke, giving extracts from their speeches, and also particulars of articles and reports—prefaced by notes and comments—of meetings published in the *Freeman's Journal* and

Appeal.
1903.

DEFREYNE
v.
FITZGIBBON
AND OTHERS.

Appeal. *Evening Telegraph*, and also averring that the articles, notes,
 1903. and comments were written in support and furtherance of the
 DEFREYNE conspiracy.]
 v.
 FITZGIBBON
 AND OTHERS.

17. The United Irish League is possessed of large funds, which are invested in the names of the treasurers of the League. The said funds have been employed in furtherance of the said conspiracy, and organisers (of whom the defendant Denis Johnston is one subsidised thereout) have been employed by the United Irish League to promote the objects of the said conspiracy, and to induce and compel the tenants of the plaintiff to join therein.

18. In consequence of the unlawful acts aforesaid, the plaintiff's tenants have been deterred through fear or persuasion from paying to the plaintiff the rents which they are lawfully bound to pay, and persons who were ready and willing to take lands from the plaintiff, and to pay rent therefor, and persons who were ready and willing to enter into agreements to take the grazing of the plaintiff's lands, and to pay for the same, have been deterred or dissuaded from doing so, and a large portion of the plaintiff's lands have been left untenanted and unprofitable to the plaintiff.

At Frenchpark, during the months of November and December, 1901, and January, 1902, the amount of rent received by the plaintiff's agent was £156 16s. 9d. During the corresponding period of 1897-8 the sum paid was £1498 18s. 4d.; in 1898-9, £1457 16s. 9d.; in 1899-1900, £2265 5s.; in 1900-1, £2643 11s. 8d.

At Loughglynn no rent was paid to the plaintiff's agent when he attended at the rent office there in November, 1901, for the purpose of collecting the half-year's rent then due.

At Mulloughroe in December, 1901, the sum of £17 16s. was received by the plaintiff's agent. For the same period he was paid at Mulloughroe in 1897, £574 15s. 7d.; in 1898, £317 15s. 1d.; in 1899, £227 5s. 5d.; and in 1900, £350 12s. 8d.

Since the commencement of these proceedings the plaintiff's tenants have paid up a large portion of the rents withheld by them during the year 1901; but a total sum of £1023 0s. 1d. out of the rents so withheld as aforesaid is in arrear and irrecoverable, and has become absolutely lost to the plaintiff by reason of the unlawful acts of the defendants hereinbefore complained of.

In consequence of the non-payment of rent aforesaid the plain-

tiff had to institute actions for rent in arrear and actions of ejectment against a large number of tenants, and was put to much expense in carrying on the same, and was compelled to institute sheriff's sales, and to employ persons to bid thereat on his own behalf, and to employ caretakers and bailiffs to take charge of holdings from which tenants had been ejected for non-payment of their rents, and which had been purchased on behalf of the plaintiff at sheriff's sales, and for which it was impossible to obtain tenants.

The costs of the plaintiff in the said actions, which he was unable to recover from the defendants in the said actions and proceedings, respectively, and which are irrecoverable, amount in all to the sum of £1387 17s. 2d.; and the plaintiff's expenses in respect of caretakers and bailiffs employed to take charge of holdings from which the former tenants had been ejected, and those which had been purchased at sheriffs' sales, amount to £416 3s. 9d. The plaintiff has paid expenses for sheriffs' fees in the said actions amounting to £190 13s. 4d., and has lost the interest of the rents during the period for which the same were withheld by the tenants to the amount of £160.

19. Prosecutions for unlawful assembly and intimidation were instituted by the Crown against several of the defendants, of whom John O'Donnell, Denis Johnston, John Fitzgibbon, Owen M'Garry, and Patrick Webb were sentenced to terms of imprisonment; but the other defendants were not deterred by the said convictions and sentences from persisting in the unlawful acts complained of, and the defendants John O'Donnell, Denis Johnston, John Fitzgibbon, and Patrick Webb recommenced the same immediately upon the termination of their respective sentences.

The plaintiff's claim is for an injunction to restrain the defendants and their agents and servants and all the members of the organization known as, or calling itself, the United Irish League, and all other persons combining and conspiring with them or any of them, from conspiring to injure and from injuring the plaintiff by conspiring to compel the plaintiff to sell his property at a price below its value:—

(a) By unlawfully and maliciously procuring or conspiring to procure the tenants of the plaintiff to conspire to break and to break their contracts with the plaintiff, and to refuse to pay and

Appeal.
1903.
DE FREYNE
v.
FITZGIBBON
AND OTHERS.

Appeal. not to pay to the plaintiff the rents which they are lawfully
 1903. bound to pay :
 DEFREYNE
 v.
 FITZGIBBON
 AND OTHERS.

(b) By unlawfully and maliciously conspiring to prevent by threats, intimidation, and boycotting persons who may be willing to enter into contracts with the plaintiff to take the lands of the plaintiff, and to pay him rent therefor, from entering into such contracts, and from taking such lands :

(c) By unlawfully and maliciously conspiring to prevent by threats and menaces, and to intimidate the plaintiff's land agent from performing his duty as such to the plaintiff, and by unlawfully inciting others to do the same, and by actual acts of violence to the plaintiff's said agent, and incitement to same :

(d) By unlawfully and maliciously conspiring to boycott and intimidate, and by incitement to boycott and intimidate, and by actually boycotting and intimidating, all tenants of the plaintiff who were unwilling to join in the conspiracy aforesaid, and by compelling them by such unlawful acts to join in the same.

(e) By watching and besetting the holdings upon the plaintiff's estates belonging to tenants willing or about to pay their lawful rents to the plaintiff, with intent to prevent them from so doing, and by libelling and picketing such tenants with the like intent, and by preventing such tenants from paying their lawful rents to the plaintiff, and by unlawfully conspiring to induce and inducing others to do the same.

And for an injunction to restrain the defendants and their agents and servants and all the members of the organization known as, or calling itself, the United Irish League, and all other persons combining and conspiring with them, or any of them, from doing or continuing to do any of the wrongful acts specified in the preceding paragraphs (a), (b), (c), (d), and (e), respectively.

And for damages in addition to, or in substitution for, the injunction aforesaid.

And for an inquiry to ascertain the damages sustained by the plaintiff by reason of the wrongful acts aforesaid, general relief, and costs."

The time for delivering a defence was, on the application of the *Freeman's Journal* Company, extended to 17th April, 1903, and

on that day the defendant Company delivered its defence. This defence commenced with a series of traverses of the several allegations of fact in the statement of claim, and then continued as follows:—

Appeal.
1903.
DeFREYNE
v.
FITZGIBBON
AND OTHERS.

“(17.) The defendant Company is a limited liability company, incorporated under the Companies Acts, 1862 to 1900, solely for the purpose of carrying on the business of newspaper proprietors, publishers, and printers, and for certain other purposes ancillary thereto, as defined by the memorandum of association and articles of association of said Company; and it is no part of the purposes, objects, powers, or duties of the said Company to enter into or engage in the conspiracy alleged in paragraph 4 of the statement of claim, or to do any of the acts alleged in paragraphs 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16 of the statement of claim.

(18.) No editor or other official or servant of the Company had or has any authority, either express or implied, to enter into or engage in, on behalf of the Company, any such conspiracy as is alleged in paragraph 4 of the statement of claim; and no editor or other official or servant of the Company had or has any authority to do, or take part in the doing of, on behalf of the Company, any of the acts alleged in paragraphs 5 to 16, inclusive, of the statement of claim; and the entering into or engaging in such conspiracy, and the doing of such acts, is not within the scope of employment of such editor, official, or servant.

(19.) The defendant Company will object at the trial that in point of law the action does not lie against the defendant Company, being an incorporated Company, with limited and defined powers.

(20.) The use of the phrase ‘principal organs of the United Irish League’ in paragraph 15 of the statement of claim is inaccurate, ambiguous, and misleading. The objects of the United Irish League are stated in the constitution of that body, and with those objects the newspapers published by the defendant Company are in entire accord, and are, in common with the Nationalist Press of Ireland, in the habit of commending to the people of Ireland the adoption and carrying out of all methods which can lawfully and properly be used to further the said objects. To that extent, and to that extent only, using the words in a popular sense, can the *Freeman's Journal* and the *Evening Telegraph* be regarded as the

Appeal. principal organs of the United Irish League; but the *Freeman's*
 1903. *Journal* and *Evening Telegraph* are not in the slightest degree
 DEFREYNE controlled by, or affected by, or under the influence or direction
 v. of, the United Irish League, or of any of its officers or members.
 FITZGIBBON
 AND OTHERS.

(21.) The editorial matter and news appearing in the said newspapers are published under the direct responsibility of the editors; and such editors are, in accordance with the express terms of their appointments by the Company, bound to conduct the Journals of the Company in accordance with the policy of the papers, and absolutely free from all outside influence, interference, suggestion, or dictation.

(22.) The articles, reports, notes, and comments, set out and referred to in paragraphs 15 and 16*b* of the statement of claim were admitted to the columns of the Company's papers by the Company's editors in the due discharge and performance of their duties as defined in paragraphs 17 and 18 above; and the publication of same was absolutely within the right of the defendant Company as proprietors of the newspapers.

(23.) The said articles, reports, notes, and comments, were not designed or published in support of, or in furtherance of, the alleged conspiracy; nor were same published with intent to further the objects of said alleged conspiracy; nor were they published for the purpose of inciting the plaintiff's tenants to join and support the said conspiracy; nor were they intended to advocate, nor did they advocate, the acts alleged in paragraphs 5 to 12 of the statement of claim; nor were they intended to libel, nor did they libel, nor did they incite others to libel, tenants of the plaintiff who were about to pay their rents; nor were they written and published in furtherance of any conspiracy to libel or to incite others to libel such tenants.

(24.) In so far as the publications referred to in paragraphs 15 and 16 of the statement of claim are reports and news, they are fair and accurate reports of public meetings and other public occurrences, and were published as matters of public interest and concern, and for the public benefit. They were published in the newspapers of the defendant Company in common with other Irish newspapers and some English newspapers; and the *bona fide* object of such publication was to supply the readers of the news-

papers published by the defendant Company with true and accurate accounts and descriptions of occurrences of public interest and importance.

Appeal.
1903.

DeFREYNE
v.

FITZGIBBON
AND OTHERS.

(25.) In so far as said publications consist of articles and comments, they were published in accordance with the general policy of the Company's journals on the subject of the creation of a peasant proprietary in Ireland, and were confined to matters arising upon the reports appearing in the public Press. Such articles and comments were fair and *bona fide* comments upon matters of public interest, namely, *inter alia*, the creation of a peasant proprietary in this country (which has been a subject of public interest for the last fifty years, and especially since the passing of the statute 33 & 34 Vict. c. 46, and the succeeding Land Law (Ireland) Acts, all of which recognised the public utility of such a principle). Such articles and comments were published by the defendant Company without malice and in accordance with the general policy of the Company's journals, and the publication was for the public benefit."

No defence having been put in by any other defendant, and no extension of time having been asked on behalf of any of them, on June 3, 1903, the plaintiff served two notices, one a notice of trial on the *Freeman's Journal* Company, the other a notice of motion for judgment in default of pleading on the other defendants.

Before this motion came on for hearing defences were (without leave) delivered on behalf of the other defendants. These defences were practically identical in force. They traversed the allegations of fact in the statement of claim, and concluded with the following or similar paragraphs:—

"18. The said defendants say that in so far as they made any speeches or comments, that the wretched state of affairs on the De Freyne estate, and the unfortunate relations between the plaintiff and his tenants were matters of great public interest and discussion and comment, not only in Roscommon, but throughout Ireland, England, and Scotland, and the said defendants, *bona fide* and without malice, and believing them to be true and of public interest and importance, made each of them such speeches or comments, and the said defendants say that the said speeches

Appeal.
1903.
DEFREYNE
v.
FITZGIBBON
AND OTHERS.

and comments were not made in pursuance of any conspiracy, or to do the plaintiff harm, but with a view to relieve the plaintiff's tenants, and to assist them in their unfortunate position, and to procure some remedy for their grievance.

19. The said defendants say that there never was, and that there is not now, any need for or right, legal or equitable, to an injunction as prayed for, and will contend that no case has been made, or if made, it has ceased, for any injunction. The statement of claim, which was delivered more than seven months after the institution of the action, and after a motion for interlocutory injunction had been served and not persisted in, and long after the agitation and what was called a Land War on certain associated estates in the statement of claim, described as a conspiracy, had ceased to exist, and the said defendants will contend that the plaintiff has disentitled himself by his course of conduct in these proceedings to any relief by way of injunction, and that said injunction has now no object upon which to operate, and from the events which have happened since this action was instituted in June, 1902, could be only mischievous and disturbing.

20. The said defendants further say, and will contend at the trial of this action, that the same has not been *bona fide* brought, but has been commenced by the plaintiff with the object and purpose of suppressing and having declared unlawful by means of an injunction in a civil action, the organisation known as the United Irish League, which has been recognised as a legal and legitimate combination by the Irish Government and the lawfully constituted authorities of this country; and the said defendants will contend at the trial that the plaintiff is not entitled to use the High Court of Justice or its machinery to effect such object and purpose.

21. The defendants further say that the injunction and damages claimed in this action against every member of the United Irish League throughout Ireland, are not claimed *bona fide* for the protection of the plaintiff's private rights, but as a device to constrain the Irish executive, in case of a decree of this Honourable Court against the United Irish League, to suppress the said United Irish League, which is a political organization to

which the plaintiff was hostile, and of whose suppression he was desirous. *Appeal.*
1903.

22. The defendants further say that the speeches and reports complained of in the statement of claim, and more particularly in the 16th paragraph thereof, were spoken and published *bona fide*, and without malice, and exclusively with a view to promote a remedy for the distressed and intolerable condition of the plaintiff's tenants, and solely in the interests of said tenants, and a duty of humanity, and were in no sense in furtherance of a conspiracy against the plaintiff, or with an intention to do him a wrong. *DEFREYNE*
v.
FITZGIBBON
AND OTHERS.

23. The defendants submit that the existence of a conspiracy alleged by the plaintiff, and the damage alleged to have been caused thereby, if committed, would have been a common law wrong.

24. The defendants further say that the damages claimed, being necessarily unliquidated, can only be inquired into by a jury."

When the motion for judgment came on for hearing, the Vice-Chancellor gave liberty to the defendants to deliver and file the defences, and extended their time for doing the same, and at the same time fixed the trial of the action for an early day in July, 1903.

On the 25th day of June the defendant, Johnston, served a notice of motion for 29th June, asking that the questions of fact arising on the pleadings in the action, and the assessment of the damages, if any, to which the plaintiff was entitled, should be tried and ascertained by a jury, to be empanelled in the Court as provided by the statutes and the rules of the High Court of Justice in Ireland.

The Vice-Chancellor refused this application, and from his refusal the present appeal was brought on short notice by special leave of the Court of Appeal.

The Right Hon. The Macdermot, K.C., and Matheson, K.C.
(with them *John O'Mahony*), for the appellant:—

The defendants are charged with being guilty of a criminal conspiracy, and are entitled to have the question of their guilt

Appeal.
1903.
DEFREYNE
v.
FITZGIBBON
AND OTHERS.

tried before a jury. The course of proceedings in this action, the dates of the several steps taken, the abandonment of the application for an interlocutory injunction, the allegations in and the relief claimed by the statement of claim, make it plain that the substantial relief sought by the plaintiff is damages—unliquidated damages. The assessment of unliquidated damages is always the special province of a jury. Actions where the cause of action is similar to that involved here—criminal conspiracy and boycotting—are usually brought at the common law side of the Court, where the defendant has a right to a jury as of course: *Kearney v. Lloyd* (1); *Mogul Steamship Co. v. M'Gregor* (2); *Allen v. Flood* (3); *Temperton v. Russell* (4); *Leathem v. Craig* (5); *O'Keeffe v. Walsh* (6). The case recently before this Court—whose decision was subsequently affirmed in the House of Lords—*The Secretary of State for War v. Studdert* (7), is quite distinguishable; it was an action based on breach of trust; all the common law counts in the pleadings involving questions of negligence and liquidated damages were struck out in this Court; the action then became a simple Chancery action, and was naturally to be tried in the way such actions are usually tried. *Lyons v. Wilkins* (8) was a case for an injunction substantially; damages were hardly any part of the relief sought. The analogy of a libel action applies: an injunction may be granted to restrain publication of a libel; but only after proof of actual damage, and the question of damages as well as of libel, or no libel, are for the jury in the first instance: *Saxby v. Easterbrook* (9); *Thorley's Cattle Food Co. v. Massam* (10); *Thomas v. Williams* (11); *Dicks v. Brooks* (12); Odger on Libel and Slander, p. 340. Before the Vice-Chancellor the defendants contended that as a matter of right they were entitled to have the questions of fact involved in the action tried by a jury; but at least, as a matter of discretion, the Judge should have directed these questions to be left to a jury.

- (1) 26 L. R. Ir. 268.
- (2) 21 Q. B. D. 544; 23 Q. B. D. 598, 616; [1892] A. C. 25.
- (3) [1898] A. C. 1.
- (4) [1893] 1 Q. B. 715.
- (5) [1899] 2 I. R. 667; [1901] A. C. 495.

- (6) [1903] 2 I. R. 681, 730.
- (7) [1902] 1 I. R. 240, 375.
- (8) [1899] 1 Ch. 255.
- (9) 3 C. P. D. 339.
- (10) 14 Ch. D. 763, 781.
- (11) 14 Ch. D. 861.
- (12) 15 Ch. D. 22.

O'Shaughnessy, K.C., and Jellett, K.C. (with them *O'Connor, K.C., P. L. Nolan, and Gerald FitzGibbon*), for the plaintiff:—

Appeal.
1903.
DeFREYNE
v.
FITZGIBBON
AND OTHERS.

The question whether the defendants are entitled to a jury under section 48 of the Judicature Act, 1877, turns on the consideration whether the present action could have been instituted by bill in the Court of Chancery before the passing of that Act. Though the conduct with which the defendants were charged by the bill amounted to a criminal offence, yet the Court of Chancery always had jurisdiction, and was bound to exercise its jurisdiction, when an injunction to restrain that conduct was sought for the sake of protecting property: *Macaulay v. Shackell* (1); *Emperor of Austria v. Day and Kossuth* (2); *Attorney-General v. Sheffield Gas Consumers' Co.* (3). A criminal offence was charged in *Lyons v. Wilkin* (4), yet an injunction was granted to restrain it. The cause of action in *The Secretary of State for War v. Studdert* (5) disclosed a crime, yet the case was held fit to be tried in the Chancery Division, and a jury was refused. Prior to the Judicature Acts the defendants would have had no right to have a jury: *Bovill v. Hitchcock* (6); the Chancery Amendment Act, 1858, gave no right to a jury in a case like this; sections 42 and 48 of the Judicature Act do not change the law, they only preserve it. The plaintiff's main remedy is an injunction; but he is entitled to claim and recover damages as well: *Hayward v. Hayward* (7).

This Court will not interfere with the discretion of the Vice-Chancellor: *Mangan v. Metropolitan Electric Railway* (8); *Jenkins v. Bushby* (9); *Swindell v. Birmingham Syndicate* (10). That the discretion was rightly exercised is plain: *Moffett v. Lord Gough* (11).

The delay in this action is due to the defendants.

Serjeant Dodd, Ignatius O'Brien, K.C., T. F. Molony, K.C., and W. J. Johnston, for the *Freeman's Journal Company, Limited*.

(1) 1 Bli. N. S. 127.

(2) 3 De G. F. J. 217.

(3) 3 De G. M. G. 304.

(4) [1899] 1 Ch. 255.

(5) [1902] 1 I. R. 240, 375.

(6) L. R. 3 Ch. App. 417.

(7) 34 Ch. D. 199.

(8) [1891] 2 Ch. 551.

(9) [1891] 1 Ch. 484.

(10) 3 Ch. D. 127.

(11) 1 L. R. Ir. 331; see *per* Christian, L.J., pp. 365, 369-373.

Appeal.
1903.

D. Kehoe and George M'Sweeney, for other defendants.

DeFREYNE

LORD ASHBOURNE, C. :—

v.
FITZGIBBON
AND OTHERS.

July 4.

This is an appeal from an order of the Vice-Chancellor refusing to direct that the questions of fact raised by the pleadings and the assessment of damages, if any, should be tried and ascertained by a jury.

The action was commenced on the 13th June, 1902. By the writ of summons the plaintiff charged the defendants with a conspiracy to injure him, and he sought for an injunction, and also damages—unliquidated damages. The action was founded on a charge of conspiracy which was presented in a variety of forms, and the relief sought was an injunction and also assessment of damages.

In July, 1902, the plaintiff applied for an interlocutory injunction; but that application was not proceeded with, owing, I believe, to the state of business in the Vice-Chancellor's Court. However, no effort was made either before the vacation Judge, or after the vacation, to reagitate the plaintiff's right to an interlocutory injunction; and up to the present no effective step has been taken to seek for or obtain that injunction.

On February 18, 1903, the statement of claim was delivered, and the defences were subsequently put in as we have been told during the progress of the case. Then came the notice of trial and notice of motion for judgment against the defendants who had filed no defence. Thereupon two of the defendants applied by separate motions to the Vice-Chancellor that the issues of fact should be tried by a jury. On the hearing of these motions the defendants presented their view that, having regard to the nature of the case, and what they conceived to be their rights under the Judicature Act, they were entitled to a jury: and asked that the questions of fact and the assessment of damages, if any, should be tried by a jury. The matter was fully discussed before the Vice-Chancellor. But I infer from his judgment, the report of which I have read, that the defendants' application was presented to him as a legal claim, and that he was told that under section 48 of the Judicature Act the defendants were entitled to ask as of right that the case should be heard and all questions of fact decided by

a jury. The Vice-Chancellor came to the conclusion that this contention was ill-founded, and that there was no such right; that the defendants were seeking to put an extreme and, as he thought, unfounded construction on the Act of Parliament; and applying his mind to that which was the topic and contention addressed to him, he refused the motions asking for the jury. One of the defendants who made these applications is the appellant in the present appeal.

Appeal,
1903.
DEFREYNE
v.
FITZGIBBON
AND OTHERS.
Lord
Ashbourne, C.

I am not prepared to say that the contention before the Vice-Chancellor would be sufficient to carry the application. The arguments of Mr. O'Shaughnessy and Mr. Jellett go to show that a very substantial case could be made against the contention that the Vice-Chancellor was bound as matter of law under section 48 of the Judicature Act to direct the case to be heard and its issues decided before a jury. If the question stood there, I should have had a difficulty in arriving at a conclusion which would have been opposed to that reached by the Vice-Chancellor. But on the appeal the question has been put on wider and broader grounds. The notice of appeal was framed with the view to present the case to this Court in every conceivable aspect on which legitimate consideration could be directed. The Macdermot did not give up the contention under section 48, but took wider grounds, asking the Court to look at the entire case—its dimensions and its development in pleadings and in argument, and to say that everything as it stood indicated that, as a question of discretion, taking a broader view than is involved in the mere consideration of the 48th section of the statute, it was one which might legitimately be asked to be tried before a jury. The defendants said they could not look on the claim for an injunction as urgent, or the main object of the action. They dwelt upon the delay that had taken place—the eleven months that had elapsed during which no operative step was taken to obtain an injunction. They said that the plaintiff's right to an injunction, although it was, of course, a matter of importance to be considered by any tribunal at any time, when the case would come to a hearing, still, having regard to the lapse of time, it could not be put forward as a matter of great urgency, and they said that *to-day*, in the living present, the main ground of the plaintiff's claim was the charge of

Appeal.
1903.
DE FREYNE
v.
FITZGIBBON
AND OTHERS.
Lord
Ashbourne, C.

conspiracy and the claim for damages, if the charge were made out. The Macdermot also argued that the issues raised were common law issues, and more germane to the province of a jury; and he quoted a number of cases somewhat analogous, viz. *Allen v. Flood* (1); *The Mogul Steamship Case* (2); *Temperton v. Russell* (3); *Leathem v. Craig* (4), and *O'Keeffe v. Walsh* (5), cases all tried at the common law side of the Court, with a jury taking its legitimate part in considering and deciding the case. Under these circumstances, reading the statement of claim and the pleadings, he contended that under all the circumstances a jury was legitimately asked to try all the issues of fact, and in addition that it was especially a case in which a jury might be asked to assist any tribunal in assessing damages. It was put to us with considerable force by The Macdermot and Mr. Matheson that it was best to have one trial and not several—not to have one tribunal deciding one part of the case and a jury afterwards possibly assessing the damages. While they did not at all abandon the 48th sect. point, they rested the substance of their argument upon the broader ground that, looking at the whole case, the issues involved, and the assessment of damages that might be required if the case resulted in a particular way, this was a legitimate case for the Court in its discretion to declare that, apart altogether from the Judicature Act and the cases cited, it was a case for a jury.

Of course as against that we had very powerful arguments addressed to us by Mr. O'Shaughnessy and Mr. Jellett, who said that this was an action within the purview of a Court of Equity; that an injunction was what was really sought; that there was no reason why a jury should be called in; that it was not a usual or ordinary part of the machinery of a trial in equity; that no case was made to justify on the law point the asking of the jury under sect. 48; and as to the question of discretion they argued with great force and power that it would be ill applied in directing a jury.

I do not disparage the efficacy of an injunction; I do not belittle it; I do not say that the lapse of time shows that the need

(1) [1898] A. C. 1.

(2) 21 Q. B. D. 544; 23 Q. B. D.
598, 616; [1892] A. C. 25.

(3) [1893] 1 Q. B. 435, 715.

(4) [1899] 2 I. R. 667.

(5) [1903] 2 I. R. 681, 730.

for it may have passed off, or that the plaintiff may not still be entitled to press for it. I offer no opinion upon that. But the lapse of time certainly has enabled those who appeared for the appellant to point out that it has been indicated by the history of thirteen months that the injunction has not been put forward as a topic of great urgency, and to argue that there was nothing to indicate in the history of the case that the plaintiff looked upon the injunction as vital for working out the relief to which he thought he was entitled, and which he intended to press when the hearing of the action comes on.

Appeal.
1903.
—
DeFREYNE
v.
FITZGIBBON
AND OTHERS.
—
Lord
Ashbourne, C.

The case recently in this Court, *Secretary of State for War v. Studdert* (1), was referred to. I do not think that it has any overwhelming application to this case, although it may be a case to be considered. The judgments in it throw a sidelight on the administration of the jurisdiction now appealed to. I was not present at the hearing of the appeal on the particular motion in which the defendants asked for a jury; but I would infer that if the plaintiff there had not abandoned his claim for negligence, and for unliquidated damages, in all probability a jury would have been granted to try the case. There are a great many valuable remarks in the judgments, all going to show that the claim for a jury was one that was entitled to careful and anxious consideration whenever it was put forward by defendants who thought their case could be more legitimately and adequately tried by such a tribunal.

It is said this is a case in which the Vice-Chancellor has exercised his discretion, and that we should not lightly interfere with the discretion of any Judge, and certainly not with that of any one with the great experience of the Vice-Chancellor. I entirely concur. When a Court of Appeal is asked to review the exercise of a discretion, it is bound to act with great caution, and only after the fullest and most anxious consideration. We must take a broad view and a fair view. We must put ourselves in the position of the learned Judge who exercised his discretion, and, with the benefit of the fuller view and more complete argument of the case presented here, consider, having regard to everything, what

Appeal.
1903.
DEFREYNE
v.
FITZGIBBON
AND OTHERS.
Lord
Ashbourne, C.

is the proper order to make. It is admitted that this case was not presented before the Vice-Chancellor in any other way than as a topic of law under the 48th section. The Vice-Chancellor had presented to him the 48th section, and he was told, "That is the law: you must obey the law: we are within the 48th section. We demand a jury under the 48th section." The Vice-Chancellor said, "No. That is not my reading of the 48th section." But he does not appear to have been asked to consider the case from any other point of view.

I have arrived at the conclusion, considering everything in the case, without going into any details, that the defendants' application was not unreasonable; and that, having regard to the facts and dates and pleadings, and considering the case as it stands—without laying down any general rule applying to other cases—the application was one which should have been complied with. I, therefore, think that the appeal should be granted. But having regard to the way the case was presented in the Vice-Chancellor's Court, the costs of both parties in that Court and of the appellant here should be costs in the cause.

WALKER, L.J. :—

The question which is raised by the notice of appeal is whether—looking at the pleadings and nature of the action—the questions of fact arising on the pleadings and claim for assessment of the damages, ought to be tried and ascertained by a jury. The appellant says—1, That is my right expressly conferred by the 48th section of the Judicature Act; and 2, if it is not an absolute right, and if the granting of a jury lies in the discretion of the Judge, the refusal of a jury is not in a case like this the exercise of a sound judicial discretion; and he challenges the order on that ground also.

I do not think that the appellant in the Court below appealed at all to judicial discretion; but he is entitled to say here—"If I was not entitled to the order claimed, as of right, I should have been granted it by the Judge in the exercise of his judicial discretion, and I claim it on that ground also."

The first material matter clearly to understand is what is the character of the action. The plaintiff is a landlord, with estates

in Roscommon, Sligo, and Galway, which have an annual rental of about £11,372. The claim states that the rents were paid with reasonable punctuality down to 1901. It states the founding of the United Irish League in 1898, and its object. It names some thirty defendants, twenty-one of whom are the committee of the League; but only as representing all its members, whoever they may be. The *Freeman's Journal*, Limited, are also defendants, and a number of others, who became locally connected with the Roscommon property, and disturbances there. Paragraph 4 of the statement of claim avers that, "in the year 1901 the defendants, with intent to injure the plaintiff, wrongly and maliciously conspired together to compel him to grant to his tenants a permanent abatement of 6s. 8d. in the £ sterling upon the rents which they had contracted, and were legally bound to pay to him, and also to compel the plaintiff to sell his estates for prices less than their true value to the occupying tenants thereon." The succeeding paragraphs of the statement of claim state a series of overt acts, ten in number, done in furtherance of the conspiracy; reports and articles in the *Freeman's Journal*, published with intent to further the objects of the conspiracy, the plaintiff's losses in his rent collections in 1901 and 1902, including costs, sheriff's fees, expense of caretakers, &c. The plaintiff adds, that since the commencement of the proceedings—for the statement of claim was delivered eight months after the writ was served—the tenants have paid up a large portion of the rents that they should have paid in 1901; but there is a total sum of £1,023 in arrear and irrecoverable. The first paragraph of the prayer for relief is a claim "for an injunction to restrain the defendants, and their agents, and servants, and all members of the organisation known as, or calling itself, the United Irish League, and all other persons combining and conspiring with them or any of them, from conspiring to injure and from injuring the plaintiff by conspiring to compel the plaintiff to sell his property at a price below its value," and by other overt acts which the prayer for relief summarizes; the first being one which, in the well-known case of *The Queen v. Parnell* (1), was declared to be an unlawful conspiracy. The prayer, then,

Appeal.
1903.
DEFREYNE
v.
FITZGIBBON
AND OTHERS.
Walker, L.J.

(1) Thom's Report of trial at bar.

Appeal.
1903.
DE FREYNE
v.
FITZGIBBON
AND OTHERS.
Walker, L.J.

asks "for damages in addition to, or in substitution for, the injunction aforesaid"—taking for that purpose the very words of Lord Cairns' Act; and "for an inquiry to ascertain the damages sustained by the plaintiff by reason of the wrongful acts aforesaid."

That is an allegation of an unlawful and criminal conspiracy existing throughout Ireland, yet unchecked by those charged with the preservation of order, with overt acts causing damage—unliquidated damages in the fullest sense in which the words can be used. There cannot be a more typical action for unliquidated damages; for without the damages the action for conspiracy would not lie, though there might be an indictment for the conspiracy in a criminal court.

Now, it is clear that before Lord Cairns' Act of 1858 this action could not be brought in the Court of Chancery in this form. An injunction to restrain the illegal acts could always be obtained, and this will be so even though the acts constitute an indictable or criminal conspiracy. For that proposition I may refer to the argument on the motion for an injunction in the *Mogul Steamship Case* (1), where an injunction was asked for in the Common Law Division; and I may observe that in the well-known common law case of *Temperton v. Russell* (2), an injunction was actually granted.

In this particular case the plaintiff has shown that he considers the damages an important part of his relief by his dropping the application for an interlocutory injunction which he made a year ago. If he were now to abandon his claim for damages, I think his right in equity would be clear; though an injunction is now nearly as common a remedy in an action at law as in one in the Chancery Division. I am far from saying that he does not still consider the injunction very important, and that he will not at the hearing seek such a remedy for the wide purposes, and over the wide area of men and purposes, to which he directs it in his claim.

But it is said that from 1858, when Lord Cairns' Act was passed, an action like the present was an equitable action in which the plaintiff had a right not only to an injunction, but to obtain all his damages in addition to the injunction in the same action in

(1) 15 Q. B. D. 476.

(2) [1893] 1 Q. B. 715.

the Court of Chancery, and, therefore, there was no right in the defendant, when the Judicature Act passed, to have questions of fact in the action in which the injunction was claimed tried by a jury. I myself entertain doubt whether an action, the object and scope of which are to get unliquidated damages, could, even after Lord Cairns' Act, and before the Judicature Act, be brought in the Court of Chancery. Damages "in substitution for the injunction" mean damages where the injunction is not given. The cases in which a plaintiff can get damages under Lord Cairns' Act, "in substitution for an injunction," are summarized in *Shelfer v. City of London Electric Lighting Co.* (1), by Lord Justice Smith; and he lays down that this course will be followed only in a case where the injury to legal rights is small, and where it is one capable of being estimated in money—and that a small money payment—and where it would be oppressive to the defendant to grant an injunction. I myself entertain doubt, as I have said, whether such a case as the present, in which the plaintiff complains of a wrongful and illegal conspiracy, and claims unliquidated damages in respect of overt acts done in furtherance of the alleged conspiracy, is one of damages "in addition to the injunction," within the meaning of the 2nd section of the Act of 1858. The main object of this action is damages wholly unliquidated. There would be no cause of action for conspiracy without the damages. It is not seriously disputed that, unless Lord Cairns' Act covers the case, the right to have a jury under section 48 of the Judicature Act is preserved.

No case could be referred to by counsel in which an action like this, claiming as its main object unliquidated damages, was brought in Chancery, whereas there are numerous cases in recent times in which actions of a similar kind have been brought in the Common Law Divisions, and an injunction claimed. I may mention the *Mogul Steamship Case* (2), and the numerous other trade union cases, including the recent *Taff Vale Case* (3), reported, on motion for the interlocutory injunction, in [1901] Appeal Cases. It was a common law action, and Mr. Justice Farwell heard the injunction motion as Vacation Judge. The recent case in our own

Appeal.
1903.
DEFREYNE
v.
FITZGIBBON
AND OTHERS.
Walker, L.J.

(1) [1895] 1 Ch. 287. (2) 15 Q. B. D. 476. (3) [1901] A. C. 426.

Appeal. Courts of *O'Keeffe v. Walsh* (1) is a striking instance also. But I
 1903. am content to assume, having regard to the wide words of the Act
DeFREYNE of 1858, that such an action as the present could after that Act
 v. have been launched in the Court of Chancery.
FITZGIBBON
AND OTHERS.

Walker, L.J. It is, I think, true that the fact of there being an injunction sought in the present case differentiates it from *The Secretary for War v. Studdert* (2). But the element of unliquidated damages is a common factor in both cases; and if we are to regard the real scope of the action, I think the substance of the relief sought is money compensation as damages caused by illegal and criminal acts; but I by no means consider the decision in *The Secretary for War v. Studdert* (2) to have the exclusive bearing upon the present case which the appellant's counsel contends.

Assuming, however, that the case is not determined by the 48th section, and that we have to consider what is the proper exercise of a judicial discretion by the Judge, I cannot help coming to the conclusion that the question of fact whether the defendants were criminal actors in this illegal conspiracy—extending over Ireland as alleged—is one which, according to the law and traditions of our constitution, should more properly be decided by a jury. It would, fortunately, I think, for our liberties, be the only competent tribunal if the legality of the combination were in question; and the propriety of submitting the case to a jury is strengthened by the circumstance that unliquidated damages—always the function of a jury—have to be assessed.

It is suggested that the mode of assessment of damages is not before us, and that we cannot speculate as to what course the Vice-Chancellor would adopt after deciding on the claim for an injunction. I myself think his written judgment, of which we have seen a copy, affords an indication of what he would do. But if a jury is the more proper tribunal for assessing the damages under Lord Cairns' Act—and I have no doubt it would be—why should there be a second trial with a jury? It is obvious the ground would have to be all gone over again.

The case was not discussed before the Vice-Chancellor as a matter of discretion; and we are not interfering with any judicial

(1) [1903] 2 I. R. 681, 730.

(2) [1902] 1 I. R. 240, 375.

exercise of it by him, though we may infer from the other part of the discussion before him what his view would be.

From the cases decided in England at the time when the discretion of the Court as to the granting of a jury was more frequently invoked than after the change in the Rules, and at the time when there was a qualified *prima facie* right in the plaintiff to a jury, I think it appears that the consideration, both in the Court of first instance and in the Appeal Court, was what, having regard to the pleadings in the action, and the circumstances of each case, would be the most just course to adopt.

I cannot accept the idea that an Irish jury will not be both competent to decide a question of fact and willing to act fairly. Our experience in recent cases has, I think, furnished proof that they are ; and I decline to endorse, in any shape or form, the sweeping condemnation of Irish jurors contained in Lord Justice Christian's judgment, on which Mr. Jellett has so much relied.

Having regard to the frame of the action in its two aspects of criminal conspiracy and claim for unliquidated damages, and to the instances of similar actions here and in England, I think the proper tribunal to ascertain the facts and assess the damages is a jury, and that, in the exercise of our judicial discretion, we should so declare.

HOLMES, L.J. :—

The statement of claim in this action is necessarily a long document ; but it is possible to state in a condensed form the causes of action. It alleges the formation in the year 1898 of an organization called the United Irish League, the objects of which are to be found in its constitution, and some of which are set forth in the pleadings. It states that the membership of the League is very numerous, and that it is impossible to sue all the members individually ; that its operations are controlled, and its funds administered by a head executive called the standing committee of the National Directory ; and that the defendants are the principal officers of the League, and members of the standing committee, and that they adequately represent the entire body for the purposes of the action. The pleadings then allege that the defendants, with intent to injure the plaintiff, wrongfully and maliciously conspired

Appeal.
1903.

DE FREYNE
v.
FITZGIBBON
AND OTHERS.
Walker, L.J.

Appeal.
1903.
DE FREYNE
v.
FITZGIBBON
AND OTHERS.
Holmes, L.J.

together to compel him to grant to his tenants a permanent abatement of 6s. 8d. in the £ upon the rents which they had contracted and were legally bound to pay, and also to compel the plaintiff to sell his estates for prices less than their true value to the occupying tenants thereon; and there is then set forth in great detail the means by which the conspirators proposed to effect their object, and the acts done by them in furtherance thereof. This is followed by a statement of the damage sustained by the plaintiff in consequence of those acts, and by a claim for an injunction to restrain the defendants, and their agents and servants, and all the members of the organization, from conspiring to injure and from injuring the plaintiff by conspiring to compel him to sell his property at a price below its value by the several methods specified, and a further claim for damages in addition to, or in substitution for, the injunction aforesaid.

Now, assuming that the case thus alleged against the defendants can be established in evidence, they have all been engaged in a conspiracy to effect an illegal object by illegal means, the overt acts of which have caused damage to the plaintiff; and from an early period of our legal history parties to such a conspiracy might have been proceeded against by bill of indictment in a criminal Court, by action at common law, for the recovery of unliquidated damages, or by bill of complaint in Chancery for an injunction to restrain acts injuriously affecting the plaintiff's property. Prior to legislation of a comparatively recent date, the two remedies last mentioned could not have been combined in a single suit. A Common Law Court could not have granted an injunction, and the Court of Chancery could not have awarded damages; but long before the Judicature Act, Common Law Courts were empowered to give an injunction in addition to damages, and Chancery was similarly authorized to award damages in addition to an injunction. Therefore, I am of opinion that, previous to the Judicature Act, a bill of complaint, corresponding with this suit, both as to the causes of action and as to the relief asked for, could have been entertained by the Court of Chancery, and the defendants therein would not have been entitled as of right to have either the issues of fact tried, or the damages assessed, by a jury.

If this be so, the provision in the 48th section of the Irish

Judicature Act, relied on by the appellant, does not apply ; and if this were the only matter before us, the appeal ought to be dismissed.

There remains, however, a very important question, referred to in the notice of motion, which The Macdermot admits he did not press upon the Divisional Court, which the Vice-Chancellor does not seem to have considered, but which has been fully argued here, and as to which we are bound to form and give an opinion. Although the defendants are not entitled to a jury as of right under the 48th section of the Act of 1877, are they entitled to claim that, in the exercise of a sound judicial discretion, the questions of fact arising in the action, and the assessment of damages, ought to be dealt with by a jury ? I have referred to the allegations in the statement of claim. It would be difficult to conceive a case embracing more serious and wide-reaching charges not merely against the defendants, but against the defendants as representing, for the purposes of the suit, an organization, the members of which are stated to be very numerous.

These charges depend entirely upon matters of fact ; and if sustained would go to show that not only the defendants but many others have been engaged in crimes for which they might afterwards be indicted. This is the kind of action which, by the traditions of English law, is regarded as peculiarly suited for a jury ; and according to my recollection the cases in recent times that most nearly resemble the present have been tried by juries. *O'Keeffe v. Walsh* (1), which came recently before this Court on a collateral point, was for a conspiracy carried on by members of the same organization—the United Irish League—and resulted in the verdict of a jury for £5500. The *Taff Vale Case* (2), an action similar to this in its character, and perhaps even of greater importance, was tried in England before a jury. I may also mention *Quinn v. Leatham* (3) in Ireland, and *The Mogul Case* (4) in England ; and there are many more. In cases such as these the verdict of a jury carries a weight and authority which the judgment of no other tribunal possesses ; and the only reason I can conceive for refusing the application would be the belief that juries

Appeal.
1903.
DE FREYNE
v.
FITZGIBBON
AND OTHERS.
Holmes, L.J.

(1) [1903] 2 I. R. 681, 730.

(2) [1901] A. C. 426.

(3) [1899] 2 I. R. 667 ; [1901] A. C.

(4) 15 Q. B. D. 476.

[495.

Appeal.
1903.
DE FREYNE
v.
FITZGIBBON
AND OTHERS.
Holmes, L.J.

will not do their duty. If there are good grounds for such a belief, the remedy would be an alteration of the law; but I do not hold it. My experience is that the jurors of this country are in the main as honest and intelligent as those of other countries; that although, like other human tribunals, they make mistakes, such mistakes are comparatively few, and in civil actions are generally capable of rectification; and that miscarriages in trials by jury can be paralleled both in number and magnitude by miscarriages in trials by a judge or judges.

On the foregoing ground alone, I should be prepared to allow the appeal. At the same time I do not underestimate the importance of having the damages, which are incapable of exact calculation, and in truth must be largely a matter of speculation, assessed by a jury. Unliquidated damages of this kind could not be referred to Chamber as a matter of account; and I am of opinion that they could be better estimated by the tribunal within whose province this duty generally falls, than by a single judge who is rarely called on to discharge it.

I do not overlook the fact that the order of this Court will have the effect of postponing the trial until October. There has been, however, already considerable delay, for much of which the plaintiff is responsible; and the circumstance that the application for an interlocutory injunction was dropped nearly a year ago, shows that he is not apprehensive of any immediate damage.

G. Y. D.

H. L.
1904.
April 22.

The plaintiff appealed to the House of Lords.

O'Shaughnessy, K.C., J. E. Bankes, K.C. (of the English Bar), and *Gerald FitzGibbon*, for the appellant.

Asquith, K.C., R. J. Parker, and Theobald Mathew (all of the English Bar), for the respondents.

LORDS DAVEY, JAMES OF HEREFORD, and ROBERTSON (*diss.* EARL OF HALSBURY, C.) dismissed the appeal with costs.

Solicitors for the plaintiff: *Moore, Keily, & Lloyd.*

Solicitors for the *Freeman's Journal Co., Ltd.*: *Scallan & Co.*

Solicitor for the other defendants: *Valentine Kilbride.*

LORD DE FREYNE *v.* FITZGIBBON AND OTHERS (No. 2). *Barton, J.*
 1904.
 (1902. No. 583.) July 6, 13.

Practice—Chancery Division—Trial by jury—Settling issues of fact—Chancery Amendment Act, 1858, s. 4 (21 & 22 Vict. c. 26)—Judicature Act (Ireland), 1877, s. 42 (40 & 41 Vict. c. 57).

Where, under section 42 of the Judicature Act (Ireland), 1877, the issues of fact, arising in an action in the Chancery Division, have been ordered to be tried by a jury empanelled in a Court of the Chancery Division, it is not necessary, under section 4 of the Chancery Amendment Act, 1858, to settle, before the trial comes on for hearing, the issues of fact to be ultimately submitted to the jury.

Quære—Whether the English practice, under which Chancery Judges may send an action or issues of fact arising in an action to be tried at Assizes or at the Jury Sittings, is not available under the Irish Rules 3 and 38 of Order XXXVI.

MOTION TO SETTLE ISSUES.

In this action the plaintiff averred that in the year 1901 defendants, with intent to injure the plaintiff, wrongfully and maliciously conspired together to compel him to grant to his tenants a permanent abatement of 6s. 8d. in the £ upon the rents which they had contracted to pay to him, and also to compel the plaintiff to sell his estates for prices less than their true value to the occupying tenants thereon, and claimed an injunction to restrain the defendants, and their agents, and servants, and all the members of the organization known as the United Irish League, and all other persons combining and conspiring with them or any of them, from conspiring to injure and from injuring the plaintiff by conspiring to compel the plaintiff to sell his property at a price below its value (1).

By an order, dated 4th July, 1903, the Court of Appeal, discharging an order of the Vice-Chancellor, ordered that the questions of fact arising on the pleadings, and the assessment of

(1) The pleadings are fully given, *ante*, p. 402, *et seq.*

Barton, J. damages (if any) to which the appellant was entitled should be
 1904. tried and ascertained by a jury to be empanelled in the Court of
DeFREYNE the Vice-Chancellor, as provided by the statute and rules of Court
v. in that behalf (*ante*, p. 400). This order was affirmed by the House
FITZGIBBON of Lords.
 AND OTHERS.

The case came before the Court on motion to settle the issues of fact to be submitted to the jury, according to the practice adopted by the Master of the Rolls in *Maconchy v. Bank of New Zealand* (1), and by the Vice-Chancellor in *Hughes v. West* (1).

O'Shaughnessy, K.C., O'Connor, K.C., Jellett, K.C., Nolan,
 and *Gerald FitzGibbon*, for the plaintiffs.

Serjeant Dodd, Kehoe, K.C., Henry, K.C., Ignatius O'Brien,
K.C., Molony, K.C., D. Kehoe, Clancy, M'Sweeney, John O'Mahony,
 and *W. J. Johnston*, for the several defendants.

July 13.

BARTON, J.:—

The order of the Court of Appeal, dated the 4th of July, 1903, directed that “the questions of fact arising on the pleadings in this action, and the assessment of damages (if any) to which the plaintiff is entitled shall be tried and ascertained by a jury, to be empanelled in the Court of the Vice-Chancellor, as provided by the statute and rules of Court in that behalf.” In pursuance of that order this application has been made to me, sitting in this Court as the successor of the Vice-Chancellor, for an order that *inter alia* “the several issues of fact and of damages be settled, as provided by the 42nd section of the Judicature (Ireland) Act, 1877, and the statutes referred to therein.” The statutory provisions incorporated and preserved by the 42nd section of the Judicature (Ireland) Act, 1877, are contained in the Chancery Amendment Act, 1858, commonly called Lord Cairns’ Act, and the Chancery Regulation (Ireland) Act, 1862, which was an Act containing provisions corresponding to provisions contained in the English Act commonly called Sir John Rolt’s Act. The present application is made in view of the following provision contained in section 4 of the Chancery Amendment Act, 1858:—“Any ques-

tion of fact, and any question as to the amount of damages which shall be so ordered to be tried by a jury before the Court itself, shall be reduced into writing in such form as the Court shall direct, and at the trial the jury shall be sworn to try the said question, and a true verdict given thereon according to the evidence."

Barton, J.
1904.
DE FREYNE
v.
FITZGIBBON
AND OTHERS.

It was assumed by counsel on both sides throughout the greater part of the argument that this provision makes it necessary that all the issues or questions of fact, which may have to be submitted to the jury at the end of the trial of this action, should be settled by the Court before the trial commences. In an action like the present such a course of proceeding as the settlement before the commencement of the trial of all the questions to be submitted to the jury at the close of the trial, would be altogether at variance with all our modern practice and experience of jury trials. At an early stage of the argument I entertained doubts as to the supposed necessity under this section for any such unusual procedure; and I think that those doubts were shared by counsel on both sides in the course of the discussion.

After consideration, I have come to the conclusion that the section does not require anything of the kind. There is nothing about "settling issues" in the section. The section seems to have had in view the necessary arrangements for a trial in a Court where trials with a jury are unusual. For example, one reason for requiring that any question of fact, which may be ordered to be tried by a jury, shall be "reduced into writing" may be to have a suitable issue paper framed, with the help of which the officer of the Court may be enabled to swear the jury. This provision in Lord Cairns' Act apparently contemplated some issue of fact arising in the course of a Chancery suit, rather than a case like the present. The only cases to which, as far as I am aware, this provision has hitherto been applied in Ireland have been *Maconchy v. Bank of New Zealand* (1) in the Rolls Court, and *Hughes v. West* (1) in this Court. Those were Chancery suits in the course of each of which an issue as to the alleged forgery of a document arose, and the Court applied this section, and tried the issue of forgery with a jury. In the present case the order runs that "all

(1) Unreported.

Barton, J.
1904.
DeFREYNE
v.
FITZGIBBON
AND OTHERS.

the questions of fact arising on the pleadings in the action" are to be tried by the jury. All that is necessary, in order to comply with this provision in Lord Cairns' Act, is to follow the general terms of the Court of Appeal order, and reduce them into writing in a form suitable for the purposes of the trial. In other words, I propose in this respect to try this action just as any action of the kind is tried at Nisi Prius or at Assizes, and to frame the questions for the jury after the evidence has closed and in the light of the evidence. To settle, before the trial commences, all the issues which may ultimately have to be submitted to the jury would appear to be, in a case like the present, a very strange proceeding; and I am glad to be able to come to the conclusion that there is nothing in section 4 of the Chancery Amendment Act, 1858, requiring such a course to be taken.

The discussion upon this application has served to remind us of the difference which section 42 of the Irish Judicature Act has brought about between the English and Irish practice upon this subject of trials of Chancery actions or issues by a jury. In England, to quote a phrase of Lord Macnaghten's, used in reference to some other provisions in these Acts (1), Lord Cairns' Act and Sir John Rolt's Act "were superseded by the Judicature Act." In Ireland section 42 of the Irish Judicature Act preserved these particular provisions as to the assessment of damages and the trial of questions of fact in the Chancery Division. I am not aware of any provision in the English Judicature Act corresponding to section 42 of the Irish Judicature Act, under which this action has been ordered to be tried in this Court with a jury. It is stated in Daniell's Chancery Practice that the Chancery Judges in England never try actions with a jury in the Chancery Division, but that they have a discretion in a suitable case to send an action, or issue in an action, to be tried at Assizes or at the Jury Sittings in London or Middlesex. It appears that in such a case, after the trial of the action or issue, the matter comes back to the Chancery Judge for the working out of the appropriate Chancery relief. If no Chancery relief is appropriate to the case, it seems to be the practice to transfer the action to the King's Bench Division.

(1) [1904] A. C. at p. 188.

Upon this subject reference may usefully be made to Daniell's *Barton, J.* Chancery Practice, 7th ed., vol. 1, p. 605, and following pages : 1904.
Clarke v. Cookson (1); *Warner v. Murdoch* (2); *In re Martin, Hunt* DEFREYNE
v. Chambers (3); and other English cases cited in Daniell and in FITZGIBBON
the Annual Practice. The principal rules regulating the practice AND OTHERS.
in England seem to be Rules 3 and 44 of Order 36. It is worthy of consideration whether a similar procedure may not be available in Ireland under the corresponding Rules 3 and 38 of the Irish Order 36, and whether section 42 of the Irish Judicature Act was intended to do more than preserve, as an additional and alternative method of procedure, the practice of trying issues of fact in the Chancery Division, whenever it might be considered suitable and convenient to have an issue of fact tried with a jury by the Court itself, instead of sending the issue or the action to be tried at Assizes or at the Jury Sittings in Dublin. I express no opinion upon the point, as it is not directly relevant to the present application. The question whether the practice prevalent in England is available under our Irish rules is one which may arise hereafter, and I reserve my opinion upon it.

So far as the present application is concerned I am clearly of opinion that under the procedure incorporated by section 42 of our Judicature Act it is not necessary in an action of this kind to settle before the trial commences the issues which may ultimately have to be submitted to the jury. Accordingly, there will be no rule upon that part of the motion; but as both parties proceeded up to a certain point upon the basis that it was necessary to settle issues, I think that the costs of both parties should be costs in the cause.

Solicitors for the plaintiff: *Moore, Keily & Lloyd.*

Solicitors for the defendants: *Kilbride; Scallan & Co.*

J. MAC M.

(1) 2 Ch. D. 746.

(2) 4 Ch. D. 750.

(3) 20 Ch. D. 365.

M. R.
1903.

Dec. 4, 15.

YOOL v. EWING.

(1902. No. 395.)

*Legitimacy—Declaration as to—Declaratory judgment—R. S. C., Ir.,
Order XXV., Rule 5—Presumption of paternity.*

A brought an action against B, his former wife, from whom he had obtained a divorce, and C, her infant child, whom B alleged to be the child of the plaintiff, for a declaration that C was not the child of the plaintiff, and sought an injunction to restrain B from alleging that C was his child.

The marriage took place in Scotland in May, 1894. There was one child, a boy, born shortly after the marriage. The parties did not live together as man and wife after March, 1895. The plaintiff resided near the town of E. in Scotland until the 13th April, 1898, when he left for India, and did not return till November, 1900. In 1896 B came to live in the town of E. with the boy, and was living there when the plaintiff left in April, 1898. In December, 1898, B gave birth to a girl, the defendant C, in Ireland, and registered the plaintiff as the father of the girl. She did not inform him of the birth of the child. In 1900 the plaintiff obtained a divorce in Scotland from B on the ground of her adultery with D, and the custody of the boy was given to her, in pursuance of an agreement between her and the plaintiff which contained a recital that there was only one child of the marriage, namely, the boy. B afterwards married D, and was resident in Ireland at the time of action brought:—

Held, that the Court had no jurisdiction to entertain the action.

Seemle, that, even if the Court could entertain the action, the evidence did not rebut the presumption of paternity.

Gardner v. Gardner (2 A. C. 723) distinguished.

TRIAL OF ACTION.

The facts of the case are sufficiently stated for the purpose of this report, in the head note and judgment of the Master of the Rolls.

The Solicitor-General (J. H. Campbell, K.C.), *Blood*, K.C., and *Crozier*, for the plaintiff.

Hume, K.C., and *Magrath*, for the defendant, Mrs. Ewing.

There was no appearance at the trial for the infant defendant.

M. R.
1903.

The following authorities were referred to, in addition to those mentioned in the judgment:—

Yool
v.
Ewing.

1. On the question of the jurisdiction of the Court to entertain the action: *Beddow v. Beddow* (1); *Aslatt v. Corporation of Southampton* (2); *Austen v. Collins* (3); *Re Berens* (4); *Corporation of Cork v. Rooney* (5); *Cowley v. Cowley* (6); *The Manar* (7). Judicature (Ireland) Act, sect. 28: R. S. C., Ireland, Order XXV., Rule 5.

2. On the question of evidence to rebut the presumption of the legitimacy of a child born in wedlock: *Banbury Peerage Case* (8); *Morris v. Davies* (9); *Boscile v. Attorney-General* (10).

Cur. adv. vult.

THE MASTER OF THE ROLLS:—

Dec. 15.

In this case, in which William Munro Yool is plaintiff, and Annie Barclay Ewing and Dorothy Harris Yool (an infant) are defendants, the statement of claim avers that the plaintiff was married to the defendant Annie Barclay Ewing, then Annie Barclay Reid, and now the wife of John Ernest Ewing, on the 25th May, 1894. The marriage took place at 123, Blytheswood Drive, in the city of Glasgow, at the house of Mr. Buchanan, one of the registrars of births, marriages, and deaths in that city, and was subsequently duly registered in accordance with the requirements of the law of Scotland. Within a short time after the marriage the defendant gave birth to a son, of whom the plaintiff is the father. That child was called William Munro Yool, and is residing with the defendant Annie Barclay Ewing pursuant to an agreement to that effect. Before the marriage the plaintiff had resided near Elgin, in Scotland, with his father, and after the marriage he and the defendant separated (the claim states) by mutual consent, she remaining in Glasgow, whilst the plaintiff

(1) 9 Ch. D. 89.

(2) 16 Ch. D. 143.

(3) 54 L. T. (N. S.) 903.

(4) W. N. 1888, p. 95.

(5) 7 L. R. Ir. 191.

(6) [1901] A. C. 450.

(7) [1903] P. 95.

(8) 1 Sim. & St. 153.

(9) 5 Cl. & F. 163.

(10) 12 P. D. 177.

M. R.
1903.

Yool
v.
Ewing.

returned to Elgin to reside there with his father, from whom the marriage was then kept secret. The defendant Annie Barclay Ewing remained in Glasgow for some time after the marriage, and then went to London, where she resided until March, 1895. She then returned to Glasgow, where the plaintiff took lodgings for her, and remained with her for two or three days. The plaintiff has (he states) never since the month of March, 1895, cohabited or had marital connexion with the defendant. The plaintiff from and after the month of March, 1895, continued to reside with his parents at Elgin until the 13th of April, 1898, when he left Elgin for India, where he remained until November, 1900. The defendant Annie Barclay Ewing, on or about the 25th of December, 1898, gave birth at Killiney, county Dublin, to a female child, namely, the defendant Dorothy Harris Yool, of whom the plaintiff is not the father, but the defendant Annie Barclay Ewing on the 6th day of February, 1899, caused the defendant Dorothy to be falsely registered in Ireland, as the daughter of the plaintiff, and the following is a copy of the certificate of registration. It is then set out. The child was registered by the name of Dorothy Harris; the father is described as William Munro Yool, Killiney, Civil Engineer; the mother as Annie Yool, formerly Reid, Killiney. On the 27th of July, 1900, the plaintiff having ascertained that the defendant Annie Barclay Ewing had been guilty of improper intimacy with one Ernest Ewing, commenced proceedings in divorce against her in the Court of Session, in Scotland, and on the 18th of December, 1900, obtained a decree of divorce at Edinburgh, on the ground of her adultery. On the 19th of December, 1900, the plaintiff and the defendant Annie Barclay Ewing entered into an agreement, which was duly executed by both of them, whereby after reciting that the plaintiff and the said defendant Annie Barclay Ewing, therein called Annie Barclay Reid, were married on the 25th May, 1894, and that of the said marriage there was born only one child named William Munro Yool, the plaintiff granted the custody of the said child William Munro Yool to the said defendant Annie Barclay Ewing, and undertook to make the payments therein mentioned for the maintenance and education of the said child William Munro Yool, and it was thereby declared by the plaintiff and the said defendant

Annie Barclay Ewing that the said agreement should have the same force and effect as if it were a decree of the Lord Ordinary pronounced in an ordinary action for the custody of the said child. Notwithstanding the said agreement and declaration therein that of the said marriage there was born only one child named William Munro Yool, the said defendant Annie Barclay Ewing has asserted and maintained, and still asserts and maintains, that the said defendant Dorothy Harris Yool is the daughter of the plaintiff.

The plaintiff's claim is for—(1) a declaration that the defendant Dorothy Harris Yool is not the lawful child of William Munro Yool, the plaintiff; and (2) an injunction to restrain the said defendant Annie Barclay Ewing from asserting that the said defendant Dorothy Harris Yool is the lawful child of the plaintiff or representing her so to be.

The defence of Mrs. Ewing is that the plaintiff is the father of the defendant Dorothy Harris Yool. There is also a defence put in on behalf of the infant defendant submitting her rights to the Court.

The plaintiff when a man of about thirty years of age met the defendant Annie Ewing (then Reid) in Elgin, where his father appears to have a distillery. The defendant was then a school-girl of about seventeen years of age. There is some controversy as to whether she was sixteen, or seventeen, or eighteen. Her father, who had been a sea-faring man, had died before she was born. Some comment was made in the opening of the case for the plaintiff on the difference in social position between the plaintiff and the defendant, as her grandfather, with whom she had lived, was a coachman. So he was, he was a coachman in the employment of a nobleman who left him a farm under his will. I cannot see that this is a just ground of reproach. The plaintiff succeeded in seducing her, and she became pregnant. He took her to Glasgow, and made preparations for her confinement, which took place on the 27th of May, 1894, when a male child, William Munro Yool, was born. Two days before this, on the 25th May, 1894, plaintiff and defendant were married at a registry office, no doubt in order to legitimize the child about to be born. The plaintiff remained with her a short time, and returned to Elgin,

M. R.

1903.

Yool

v.

Ewing.

M. R.
1903.
Yool
v.
EWING.

leaving her in Glasgow. He never at any time took up house with her, but in the succeeding years visited her occasionally for a few days at a time at Blackheath, near London, where he took her, and at Glasgow; but there is no doubt he was anxious to get rid of her. His whole conduct towards her was cynical in the extreme, as was his avowal of it, considering that he had nothing to reproach her with. In 1895 she went to Elgin to try to obtain the recognition to which she was entitled. She then saw the plaintiff's father, about April, 1895, when he told her to go back to Glasgow, and he would see "justice done to her." The justice to a young wife and mother which was meant by Mr. Yool was solely of a pecuniary character, and involved her agreeing to a formal and permanent separation, which she did not agree to. At first, I think, he sent his solicitor, Mr. Whitson, to her; but she would not sign an agreement. At first the plaintiff used to give her money for her support in uncertain sums. Latterly, it amounted to £70 per annum. She tried again to melt the iceberg, and saw him at Elgin in November or December; but was sent back to Glasgow on the plea that plaintiff's father would not allow him—a man coming on to middle life—to have anything to do with the woman who was his wife, and against whom no complaint was or could be made, save that she had yielded to his seduction. She spent Christmas in Glasgow, and plaintiff was with her for a time. Then he returned to Elgin, whither she followed him, and where she remained till he left for India in 1898. She lived in a house by herself in Elgin, and during the whole time, so far as the plaintiff can say of his knowledge or even by suspicion, she lived quite respectably. The plaintiff used to meet her frequently in the street, and cut her when anyone was present, though "everybody knew she was Mrs. Yool." He took no notice of his child when it was with her. He lived by himself, some few miles out of Elgin, in a farm-house called Kirkhills, from which he went in to his father's office in Elgin every day. He often met her on the road, and, if no one was looking, used to converse with her; and on some occasions took her into the house. He admits that this happened, at any rate, twice, fixing the time at October, 1897; and that he occasionally met her, but not in the house, down to April, 1898. If ever a man acted in a shameful and disgraceful manner towards

a young wife, this man did ; for during these weary years, when she was trying to obtain the position for herself and for his child to which they were lawfully entitled, there was no breath of slander upon her character, apart from that of which the plaintiff at least could not complain. Yet he abandoned her, a young and attractive woman, against whom he swears he had no cause of complaint, in such a way as would be calculated, even if not designed, to expose her to risk, misconstruction, and temptation. The only importance in this case of this conduct of his in treating her as at best a woman with whom he had an intrigue and not as his wife, is that till he finally left Elgin, in April, 1898, he knew nothing and suspected nothing against her. Elgin is not a very large place. It is a town of some 8,000 inhabitants or thereabouts, I think. It is said that Mr. Yool, senior, is a rich man, and owns half the town. Had this girl of striking appearance, living as she lived, known to everybody as "Mrs. Yool," been leading a bad or doubtful life at this time, it would have been heard of. Yet before 12th April, 1898, her husband had "no cause of complaint" as to her conduct.

During the winter of 1897-1898, plaintiff had a housekeeper in Kirkhills, named Urquhart, an elderly woman, who was examined. She was there when the plaintiff went off, and her evidence was that during the whole time she was there she never saw the defendant in the house at all, and did not know her when she came on the 13th April to ask if he was gone. She says that she never left the house at all, but added that she was away one day a week on business ; and to suppose that the woman never left the house under any circumstances, is a very strong assumption. Of course, if the husband and wife chose to meet, her evidence would fall far short of disproving the possibility of access. On the 12th April, Mr. Yool left, taking all his luggage. He had not told his wife a word about his going. He kept his address secret from her from that time out.

Something was said in reference to the certificate of the birth of the child Dorothy, that the father was described in the registration as being a civil engineer. Well, this gentleman had been working at a distillery, he had been a farmer, he had been a coffee-planter, he had served part of his time as a civil engineer, and,

M. R.
1903.

Yool
v.
Ewing.

M. R.
1903.
Yool
v.
Ewing.

therefore, it was amongst his different qualifications. It is not a great stretch ; there was nothing very far astray in describing him as a civil engineer, because a man may be an engineer without having a diploma. There was another matter in the certificate commented on, namely, that he was described, in 1898, as being of Killiney, that is, that his residence was Killiney. Well, since he had gone away she knew nothing about what his address was, because he had kept it absolutely secret from her. She only knew one thing, that he had deserted her, and that he ought, if he was a man of proper feelings, to be residing with her. Therefore, for her to say he was "of Killiney" was a matter, if it were wrong or irregular and if there was nothing else in the case, not in my opinion of vital moment under the circumstances, nor does it gravely affect the case. The important thing is—Was the child his child?

When the defendant went to Kirkhills and saw the house-keeper on 13th April, she asked how long he was gone away for, was it on one of his usual trips? She replied, No, it was much longer, probably two or three months. The defendant inquired if he had taken much luggage. She was told that he had taken all his luggage. She asked then if he had taken his photographs? She was told, No, that they were there.

Now, as this child—I mean the defendant Dorothy Harris Yool—was born on the 25th December, 1898, its birth must have been in consequence of intercourse about March, that is whilst both plaintiff and defendant were living in Elgin, and at a time when it is obvious that the defendant had not in any way given up the hope that the plaintiff might at last act rightly, and take her to his home, or come and set up a home with her elsewhere. If her conduct had been light and frivolous at that time, it might have been otherwise; but it was not, according to the plaintiff himself.

It was sought to show not alone that the plaintiff was not the father of the child, but that another person (one Gilbert Brown) was. Now, the presumption of legitimacy in the case of a child born during wedlock is not one *juris et de jure*. I need not refer in detail to authorities such as *The Aylesford Peerage Case* (1) and *The*

Poulett Peerage Case (1). The question is one of fact. But the presumption is of enormous strength, and will not be rebutted in an ordinary case, where husband and wife live together, by mere evidence, or even proof, that a person or persons other than the husband had improper relations with the wife. In such a case the law, on the clearest grounds of public policy and decency, will not allow an inquiry as to who is the father. But it might be otherwise here, for this is not in this respect an ordinary case, as the husband and wife were not living under the same roof, though any Court would be bound to hold that there was clearly possibility of access.

In the case of Gilbert Brown, who is in South Africa, the evidence is twofold, if, indeed, there is any evidence that would affect him in any proceeding to which he was a party. First, there is the evidence of a Miss Ramsay, a young lady (I presume about as old as the defendant, though I only judge by appearance), the daughter of a lodging-house keeper with whom the defendant had stayed in Glasgow, and latterly in Paisley. Miss Ramsay said that when staying with her mother in Paisley the defendant had told her that the child of which she was then pregnant would be an "ugly little thing," for it was Gilbert Brown's. Mrs. Ramsay, her mother, also said that the defendant practically admitted that Brown was responsible for her condition, because he had promised to see her through her trouble. It is undoubted that the defendant applied to Brown for money, and obtained about £50 in all from him. She absolutely denied the conversations with the Ramsays so far as they were relied on as admissions, and it is to be observed that Miss Ramsay's evidence is open to the observation that she did not seem to regard it as peculiar, much less blameworthy, that she should have become the confidante of the amour of a married woman. Mr. Brown appears to have been a young man, and no relation, only a friend, of the defendant. That he should give her money at all is a suspicious circumstance. But he is not shown to have ever been with her under conditions which could give rise to suspicion. He met her at the railway station at Glasgow, once by appointment, in presence of Miss Ramsay, who, however, did not hear anything that passed between them.

M. R.

1903.

Yool
v.

EWING.

M. R.
1903.

Yool
v.
Ewing.

Probably he then handed her the money referred to, or some of it. In a divorce suit such facts would fail to fix him as co-respondent ; and as to the evidence of Miss Ramsay as to admissions, I believe nothing occurred save perhaps some jocular remark in very bad taste for which she was as much to blame as the defendant. Of proof in fact of adulterous intercourse with anyone else there is not even an attempt.

But putting this aside, the real gravity of the case, so far as the defendant Mrs. Ewing is concerned, arises from her own conduct, and its effect by way of positive admissions. During the time she was at Elgin a tradesman, one Lamb, sued her husband for necessities provided for her use. In that case there were allegations that husband and wife had not cohabited for a period of some years. Whether that was true in any sense is not very material. It was not proved that it covered the whole of the four years, but the importance of it is that she did state that she and her husband had not cohabited for a long time. That may possibly have meant that they did not live together, and in that sense it was true. But still it is a very strong fact against her. Then, again, in the divorce proceedings, the pleadings alleged distinctly that there had been no marital intercourse during a time which would abundantly cover the period in question ; and during these divorce proceedings, not only by the pleadings, but also by the statement made in her presence, and which, so far as it is relative to this inquiry, was not contradicted, it was alleged that they had not cohabited. The strongest of all, perhaps, is the execution by her of the agreement in reference to the maintenance of the child, dated 18th and 19th December, 1900, made in the course of these divorce proceedings, in which undoubtedly the child William Munro Yool is described as the "only child" of the marriage.

If ever a litigant put herself in the wrong by conduct, the defendant did in all these proceedings, not only by way of affirmative statements, but by the absence of negations. It is possible that in the tradesman's action the word "cohabitation" may have been used in a way suggesting residence as husband and wife under the same roof. In the divorce proceedings the statements relied on were merely pleadings, though both of these are strong evidence

of admissions by her that the child born on 25th December, 1898, was not the plaintiff's. But the agreement for the maintenance of the first child, stating it to be the "only" child of the marriage, is not open to either of these explanations. She says her sole object was to retain the custody of the boy, and she did not want to say anything about the other child, of whom her husband knew nothing, save that it existed. She was, no doubt, most anxious to obtain a divorce, so as to be able to marry the man with whom she was then living and who is now her husband. As against her there is a strong case by admissions. But there is no independent proof of adultery in the spring of 1898, and she has denied its occurrence in the most positive manner. Suspicious as are all the circumstances as to what she said and as to what she did not say in the course of those proceedings, I cannot forget that the onus is on the plaintiff to get rid, by clear and positive evidence, of the presumption of legitimacy. If this were a suit for divorce, my mind would be in a condition of much doubt as to what I should do. But it is a suit mainly and really not against Mrs. Ewing, but against the other defendant, the infant. The decree sought for against her is a decree *in rem*; that is, a decree that would be final, and binding, and conclusive; for a decree *in rem* will bind even a child who was *en ventre sa mère* when it was pronounced. On the evidence before me, I should refuse to pronounce such a decree.

But what I have all along felt to be the most serious aspect of the case, from a legal point of view, remains—that is, what jurisdiction have I to decide this case at all? The case made is two-fold: it is, first, to have it declared that the defendant Dorothy is illegitimate, and, secondly, for an injunction to prevent the first defendant from asserting the legitimacy of the other. When I heard the nature of the case, I asked for some authority showing that such a suit could be maintained, on either ground, in our Courts. It is not a suit to reform and amend the register of births, nor could it be. I have no control over the Registrar-General, and he is not a party to the proceedings. The Solicitor-General suggested that the Registrar-General would probably alter the register if the plaintiff obtained a decree. I know of no power which would enable him to do so, and I believe there is

M. R.
1903.

YOOE
v
EWING.

M. R.
1903.
Yool
v.
Ewing.

none. Again, no right to property is involved. There is no allegation or suggestion of any right in the statement of claim as giving foundation to the suit. It was ingeniously suggested at the trial that under Scotch law the defendant Dorothy, if legitimate, would be entitled if, and when, the plaintiff died, and if she survived him, and if he left personal estate, and if he retained his Scotch domicile, to a share more or less in his "executry." But it is absurd to suggest that the case was brought for any such purpose. So far as I can see, Mr. Yool, senior, would have as much right to bring the action on that ground as the plaintiff, for the infant Dorothy might be one of his "heirs" just as well as one of the plaintiff's. The Court, too, always objects to make a declaratory decree in respect of future rights unless it is absolutely necessary so to do, and for that I may quote a few words from the case of *Lady Langdale v. Briggs* (1) to which I was referred by Mr. Lawson as *amicus curiæ*, and which appears to have an important bearing upon a branch of this case. In that case Turner, L. J., lays it down distinctly that in the course of his long practice in the Court of Chancery he had never known a mere declaratory decree about future rights to be given except there was something that could be determined. He says, at page 419 :—

"The argument on the part of the appellant Edward Bacon in support of his claim to have his rights declared and directions given with respect to them, even assuming his interest to be reversionary merely, was so strongly pressed at the bar, that I think it right, in the first place, to state my opinion upon that point, the more so as it is certainly a point of much importance with reference to the course and practice of the Court, and, I may perhaps add, to the law of the country. As long as I have known this Court—now for no inconsiderable period—I have always considered it to be settled that the Court does not declare future rights, but leaves them to be determined when they come into possession. In all cases within my experience where there have been tenancies for life with remainders over, the course has been to provide for the interests of the tenants for life, reserving liberty to apply upon their deaths. This practice has been so familiar to me that I confess myself to have been surprised at the length to which the argument on the part of the appellant Edward Bacon was carried on the point."

(1) 8 De G. M. & G. 391.

And at page 427 he says:—

“It is not, however, upon modern authorities only that this question, as it seems to me, must depend. I think the question deeply affects the law of the Court. This Court entertains appeals to perpetuate testimony upon the ground that the future right cannot be determined. If the Court has authority to declare future rights, upon what grounds, in the case of equitable estates, are such appeals hereafter to be maintained? The great convenience and advantage which it would be to parties to have their future rights ascertained and declared was much pressed upon us in the course of the appellant’s argument; but the course and practice of the Court constitutes the law of the Court, and I cannot agree to break through that law upon any mere ground of convenience. If the law is productive of inconvenience, it is for the Legislature to alter it, and I am far from thinking that, to some extent at least, the Legislature might not usefully interpose and provide some remedy for the ascertainment of future rights; but I think, if this be done at all, it should be done by the Legislature, as the Legislature alone can fence the measure with the protections which will obviously be required, and such a measure, if adopted, ought not to be confined to mere equitable rights.”

M. R.
1903.

Yool
v.
Ewing.

The Lord Justice hits the point when he says:—If the Court can decide future rights, what need is there for suits to perpetuate testimony, which is done “upon the ground that the future right cannot be determined”? and this shows the meaning of the words which now stand at the end of our Order XXV., Rule 5, and indicates that those words may have full scope and effect, as applicable to cases in which, though no present right could be declared, a bill to perpetuate testimony would lie. Again, at p. 428, the Lord Justice says:—

“Some aid to the appellant’s argument in this part of the case was also attempted to be drawn from the 50th section of 15 & 16 Vict. c. 86, the Improvement of Jurisdiction Act; but I take the same view of that enactment as the Vice-Chancellor Wood seems to have taken of it in *Garlick v. Lawson* (10 Hare, App. xiv.), as it does not extend the cases in which declarations of right may be made, but merely enables the Court to declare rights without following up the declarations by the directions which, according to the old practice, would have been necessarily consequent upon them”

In *Keran v. Crawford* (1, Sir George Jessel, at p. 42, says:—

M. R.

1903.

Yool

v.

EWING.

“The objection to the declaration is this, that it is a declaration as to future rights, future contingencies, and remote interests of the husband. The rule of the Court of Chancery always was not to entertain a suit merely for that purpose. There are some instances in which, as incidental to the relief given, it has become absolutely necessary to determine such rights, and in that way those rights are and must be determined; but no suit is entertained simply and exclusively for the purpose of deciding upon the nature and extent of future contingent rights without immediate present relief.”

No. This action is one for which, so far as I know, no precedent whatever exists in the history of our law. I was referred to *Gardner v. Gardner* (1), in the House of Lords, a very curious case in its facts, and one which, if an authority in this country, would be a precedent for the form of the action as against the infant defendant, but not as against Mrs. Ewing. It was an action against a lady who was twenty-five years old at the time, to deprive her of her status of legitimacy, and brought by the person whom she alleged to be her father. But that is a purely Scotch case, heard by a Scotch tribunal, and, in strictness, no more an authority in point as to jurisdiction or practice in our Courts than a decision of a French or German Court would be.

But it is contended that the Judicature Act, and the rules made under it, make the plaintiff's case clear. General Order XXV., Rule 5, states:—

“No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right, whether any consequential relief is or could be claimed, or not.”

Now, the jurisdiction under that section, just as under the previous Chancery Act, 15 & 16 Vict. c. 86, which contained a section very similar in terms (2), is a jurisdiction which all the Courts have uniformly refused to exercise, except in very urgent circumstances; and it is a jurisdiction to be very carefully exercised, and at any rate cannot be extended beyond the language of the section itself. In my opinion this provision

(1) 2 A. C. 723.

(2) Sect. 50: 30 & 31 Vict. (Ir.), c. 44, s. 155.

was not meant to introduce a new jurisdiction, so much as an amendment of procedure in furtherance of justice, and for the determination of rights by a binding declaratory judgment or order, or by binding declarations of right, whether any consequential relief is, or could be, claimed or not. If the rules went beyond this, they would be *ultra vires*. The Order seems to assume that an actual right to something, which is, or will be, under the protection of the law, be it property or status, exists; and does not contemplate that, save as ancillary to such rights, the Courts ought to be called on to make declarations. You may obtain a declaration as to the construction of a will or a deed in reference to actual or possibly contingent rights; but you cannot have a judgment or declaration in reference to facts which do not affect the plaintiff's status or property. Courts of Equity interfere only in aid of rights; and though the Order in question gives the power to make a declaratory decree, it is only in respect of the same kind and quality of rights as those in respect of which a declaratory decree might have been made before as leading to relief in the same case.

M. R.
1903.

Yool
v.
Ewing.

This is not an action for the perpetuation of testimony. That is a well-known head of equity. The law upon the subject will be found in Daniell's Chancery Practice, vol. ii., 6th ed., p. 1512, where the statute 5 & 6 Vict. c. 69, is referred to, which is as follows:—

“Whereas it is expedient to extend the means of perpetuating testimony in certain cases, be it enacted . . . that any person who would, under circumstances alleged by him to exist, become entitled, upon the happening of any future event, to any honour, title, dignity, or office, or to any estate, or interest in any property, real or personal, the right or claim to which cannot by him be brought to trial before the happening of such event, shall be entitled, from and after the passing of this Act, to file a bill in the High Court of Chancery to perpetuate any testimony which may be material for establishing such claim or right.”

This provision is re-enacted by Order XXXVII. I have had occasion to entertain such cases. They are rare, but depend upon a distinct and special head of our jurisdiction. Nothing of the kind is alleged or professed here. This case is simply brought for a declaration of the illegitimacy of a defendant without regard to

M. R.
1903.

Yool
v.
Ewing.

any question of property. Does our law, then, allow one person to obtain a declaration that another person is illegitimate, or (as here) that that person is not the lawful child of the plaintiff, no claim to property or to any right enforceable by the Court being involved or advanced?

The absence of precedent for such an action might not be conclusive, for novel circumstances necessitate novel remedies; but the circumstances here are not novel. There must have been thousands of cases (I shall show some) in which such relief, if it existed, would have seemed desirable. But there is more. If a suit could be maintained to have a defendant declared a bastard, surely one to declare a plaintiff legitimate would *a fortiori* be sustainable? As to the latter, it would be to establish status at least. Yet, even so, in a simple case, an Act of Parliament was necessary, and the Legitimacy Declaration Act, 1858, 21 & 22 Vict. c. 93, conferred the power (1). The preamble is as follows:

“Whereas it is expedient to enable persons to establish their legitimacy and the marriage of their parents and others from whom they may be descended, and also to enable persons to establish their right to be deemed natural-born subjects, be it enacted:”

Then section 1 enacts:—

“Any natural-born subject of the Queen, or any person whose right to be deemed a natural-born subject depends wholly or in part on his legitimacy or on the validity of a marriage, being domiciled in England or Ireland, or claiming any real or personal estate situate in England, may apply by petition to the Court for Divorce and Matrimonial Causes, praying the Court for a decree declaring that the petitioner is the legitimate child of his parents, and that the marriage of his father and mother, or of his grandfather or grandmother, was a valid marriage, or for a decree declaring either of the matters aforesaid.”

That is a proceeding which is brought for the purpose of establishing the legitimacy of a suitor who comes into Court for that purpose. If a person comes into Court to have his legitimacy established, and if he fails to do so, of course the decree establishes his illegitimacy. But the proceeding can only be brought to establish, not to negative legitimacy. Thus, it follows that unless

(1) Extended to Ireland by 31 & 32 Vict. c. 20.

the Judicature Act by the Order I have referred to confers the right to bring this suit, there is no power to entertain it. People have tried to do what is attempted here before. *Gurney v. Gurney* (1), not mentioned in the argument, was a very curious case. The plaintiff considered it was desirable to have a declaration of illegitimacy against a member of the family who was an infant. The counsel who advised him recommended that in order to obtain such a declaration a settlement should be made, and a sum of £2000 was actually put in settlement for the children of the marriage, for no other purpose than to give jurisdiction. There were two children, undoubtedly legitimate, who were also infants. The bill was filed by them, by their father as next friend, against the infant whose legitimacy was disputed and the trustees of the settled fund, for the purpose of having the trusts thereof carried into execution.

Vice-Chancellor Sir Page Wood said that he did not approve of the proceedings very much, but, still, it was a substantial sum of money, and he could not refuse to deal with the case, and he did deal with it, and gave a declaration, finding who were the children entitled under the settlement. Well, if it was necessary to resort to such a sham proceeding for the purpose of getting the decision of the Court, it is quite plain that neither the Court nor the advisers had any idea that they could come in by a short and simple application to the jurisdiction of the Court, and get that matter decided. If a settlement of £2000 was needed in order to give the Court jurisdiction, why should that be done if it possessed jurisdiction already? But *Gurney v. Gurney* (1) is not law. In a case reported anonymously in 2 Hemming and Miller (p. 124) which also came before Sir Page Wood on a similar state of facts that learned Judge, whilst referring without disapproval to his own judgment in *Gurney v. Gurney* (1), declined to apply it to the facts before him, and refused to make the order. But an appeal was taken from that refusal, and the case, under the name of *Cooke v. Cooke* (2), came before Lord Chancellor Westbury. At page 709, Lord Westbury says:—

M. R.
1903.

Yool
v.
Ewing.

“The settlement or declaration of trust on which this suit is founded is a fraudulent instrument—that is to say, it was prepared and

(1) 1 H. & M. 413.

(2) 4 De G. J. & S. 704.

M. R.
1903.

YOOE
v.
EWING.

executed for a purpose different from that which is expressed and apparently intended by the instrument. It was not the desire or real object of the parties to make a *bonâ fide* settlement of property or to confer any benefit on the infant defendant. The settlement was intended only to serve as a reason or occasion for the institution of this suit, the object of which is to bastardise the infant. Secondly, the refusal of the trustee on which the suit pretends to be instituted was wholly collusive and unreal. Thirdly, there is no real controversy, for there is no opposition of interest. The infant, who alone has a contrary interest under the trust to that of the plaintiff, by her counsel very properly disclaims and repudiates all right and title under the settlement. Fourthly, the suit pretends and affects to be instituted for the purpose of determining the alleged right or claim of the infant defendant to this small trust property; but in reality it is manufactured for the purpose of compelling the present trial, in an indirect way, of a most important question affecting the title to large estates, namely, the status of legitimacy or illegitimacy of the infant. It is wholly contrary to the principles which govern the administration of justice that any person should be permitted by means of an unreal trust, designed and created for the purpose, to force another person as defendant in a collusive suit to try prematurely and against his will an important right or title which has not yet arisen or come into possession, so as to admit of its being brought forward and prosecuted in the regular and legitimate manner. I approve, therefore, of the Vice-Chancellor's decision in the present case; but I cannot at all assent to the principles or reasoning on which his former decision in the case of *Gurney v. Gurney* (1 H. & M. 413) was founded."

These cases are long subsequent to the passing of the 15 & 16 Vict. c. 86, s. 50, which is in substance somewhat similar to the English Order XXV., Rule 5, which is the same as the Irish Order XXV., Rule 5. Section 50, to which I have referred, enacts:—

"No suit in the said Court shall be open to objection on the ground that a merely declaratory decree or order is sought thereby; and it shall be lawful for the Court to make binding declarations of right without granting consequential relief."

The present action is an attempt to introduce into our jurisprudence a jurisdiction not belonging to it. However excellent may be the Scotch machinery for "putting to silence" or "declarator" as applicable to cases of this sort—and I express no opinion as to that—our law possesses no such powers.

I must not be taken as indicating that the jurisdiction of our Courts is limited to questions of property. We have, for instance, power to restrain the publication of libels and the like. One of the rights of a citizen is to be protected from these. But in such cases a right is involved, and competent litigants are before the Courts. Nor must anything I have said be taken to mean that this Court has not ample power to decide questions of legitimacy when necessary, as, for instance, if a claim is raised in which legitimacy is a material element in determining rights. If an action were brought against the plaintiff here for the maintenance of the defendant Dorothy, it would be open to him to contest it on the ground that, though born during wedlock, the defendant was not in fact his child. But no such question here arises. It is simply a proceeding for the purpose of bastardising the infant defendant, and in my opinion the action fails and must be dismissed with costs.

M. R.
1903.

Yool
v.
Ewing.

Solicitors for the plaintiff: *J. & J. Galloway.*

Solicitors for the defendants: *Lyness & Hayes.*

W. L.

M. R.
1904.

IN RE HALLINAN'S TRUSTS.

May 4. *Settlement—Power of appointment—Exercise—Special power—Remoteness.*

Appeal.
June 10, 13. 1877, to a life interest in lands, with power of appointment to child or children after his death, by his will dated 20th May, 1896, appointed all the lands comprised in the settlement to one daughter on her attaining twenty-five. The testator died in 1901, when the appointee was fifteen years old :—

Held, that the appointment was not void for remoteness.

ORIGINATING SUMMONS.

By marriage settlement dated 26th April, 1877, executed on the marriage of John Hallinan, junior, with Mary Frances O'Farrell, a life estate in certain lands was limited to the husband, John Hallinan, junior, and after his decease the settled property was to be held "in trust for all or such one or more exclusively of the other or others of the children, and remoter issue of the said intended marriage, at such ages or times, or age or time, and in such shares, if more than one, and upon such conditions and in such manner, as the said Mary Frances O'Farrell and John Hallinan, junior, or the survivor of them, should by any deed, or by his or her will, appoint, and in default of appointment, and so far as same should not extend in trust for all the children of the said intended marriage in equal shares, and if there should be but one such child, then the whole in trust for such one child."

The husband, John Hallinan, junior, survived his wife, and died on 9th June, 1901, leaving a number of children surviving him.

By his will dated 26th May, 1896, John Hallinan, junior, appointed to his daughter, Maude Beatrice Hallinan, all the lands comprised in the marriage settlement of 26th April, 1877, on her attaining the age of twenty-five years. The will did not purport to make any disposition of the income of the property accruing between the date of testator's death and the attainment of the age of twenty-five by his daughter, Maude Beatrice.

Maude Beatrice Hallinan was born in 1886. The question arising for decision was as to the validity of the appointment in her favour.

M. R.
1904.

In re
HALLINAN'S
TRUSTS.

John H. S. Russell (with him *O'Connor, K.C.*), for the children of John Hallinan, other than Maude Beatrice Hallinan :—

No appointment under a special power is valid in point of remoteness unless it would have been free from objection of remoteness if it has been an original limitation in the instrument creating the power.

If the appointment in this case to Maude Beatrice Hallinan at twenty-five years had been in the instrument creating power, it might tie up the property for more than a life or lives in being, and twenty-one years; the fact that Maude Beatrice will actually attain the age of twenty-five years within twenty-one years from the death of her father is immaterial, as when a gift is infected with the vice of its possibly exceeding the prescribed limit, it is at once and altogether void both at law and in Equity, and even if, in its actual event, it should fall greatly within such limit, yet it is still as absolutely void as if the event had occurred which would have taken it beyond the boundary: *Williams's Real Property*, 17th ed., p. 376.

This case is on all fours with *Massey v. Barton* (1), and is indistinguishable therefrom; and in the judgment of the Master of the Rolls in that case, he referred to and adopted the following words of Sir E. Sugden, that "It is well established that under such a power no estate can be created which would not have been valid if limited in the deed creating the power; the test of the validity of the estates raised is to place them on the deed creating the power, in lieu of the power itself"; and then went on to say: "Adopting this test, the result would be that by this settlement the fund would be limited to the issue of the marriage, then unborn, on the death of the father; but would not become vested for a period that *might* exceed twenty-one years from the time of his death. Such a limitation would be clearly void for remoteness."

This case of *Massey v. Barton* (1) was not cited in *Wilkinson v. Duncan* (2), otherwise the latter decision might have been different.

M. R.
1904.
In re
HALLINAN'S
TRUSTS.

With regard to *Von Brockdorff v. Malcolm* (1), there were several points at issue in that case, and very little argument with respect to the point at issue in this matter; and Pearson, J., in giving judgment only went so far as to say, "I think *Wilkinson v. Duncan* (2) applies."

Arthur Clery, for Maude Beatrice Hallinan:—

The appointment is good. Maude Beatrice was fifteen years old at the death of her father, John Hallinan (from which date his will speaks), and therefore she must attain age within ten years after the life in being. This was the ground of the decisions in *Wilkinson v. Duncan* (2), and *Von Brockdorff v. Malcolm* (1). The contention of the other side is that the exact words of the appointment must be read into the original settlement. But the true rule is that the estates, not the words, are to be read in. If the words were read in literally, the appointments in *Wilkinson v. Duncan* (2), and *Von Brockdorff v. Malcolm* (1), would have been invalid. The words in the appointment may receive a different construction from that which the same words in the original instrument would have received: Farwell on Powers, p. 289. In *Hole v. Escott* (3) words which in the original instrument would have created contingent remainders, were held to create springing uses in the appointing instrument, which was a will. *Massey v. Barton* (4) is distinguishable. The present point was not raised or discussed in that case. It was a friendly suit, and it was no one's interest to raise it. The ages of the children in that case are not stated in the report, and possibly the point could not have been raised.

G. C. Green, for the trustees of the settlement of 1877.

THE MASTER OF THE ROLLS:—

The facts of the case are shortly these. By marriage settlement of 26th April, 1877, executed on the marriage of John Hallinan, junior, with Mary Frances O'Farrell, a life estate in lands was

(1) 30 Ch. D. 172.

(2) 30 Beav. 111.

(3) 4 M. & C. 187.

(4) 7 Ir. Eq. R. 95.

limited to John Hallinan, junior, and after his death the property the subject of the settlement was to go "in trust for all or such one or more exclusively of the other or others of the children and remoter issue of the said intended marriage, at such ages or times, or age or time, and in such shares, if more than one, and upon such conditions, and in such manner, as the said Mary Frances O'Farrell and John Hallinan, junior, or the survivor of them, should by any deed or by his or her will appoint," and in default for the children of the marriage equally. John Hallinan, junior, died 9th June, 1901, having survived his wife, and leaving a number of children, of whom Maude Beatrice attained eighteen in March, 1904, and there are other children younger. John Hallinan, junior, previous to his death, by his will dated 26th May, 1896, appointed to his daughter, Maude Beatrice, all the lands comprised in the settlement on her attaining the age of twenty-five years; but he did not dispose of the income of the property which should accrue between the date of his death and her attainment of the age of twenty-five.

M. R.
1904.

In re
HALLINAN'S
TRUSTS.

The question now arises as to whether the appointment in favour of Maude Beatrice Hallinan is a valid execution of the power created by the settlement of 1877, or is void on account of remoteness. The settlement would not have authorised an express appointment to unborn children on attainment of twenty-five, because that would be practically twenty-five years longer than a life in being. But the question is not quite so simple, and will have to be considered in reference to the facts. Maude Beatrice was born in 1886, and the appointment in her favour would necessarily take effect in much less than twenty-five years from the date of her father's death.

The question is whether she takes any interest under the appointment, or whether it is void for remoteness. The general rule is stated by Lord St. Leonards in his book on Powers. He says (p. 396):—"It is well established, therefore, that under a particular power, as a power to appoint to children, no estate can be created which would not have been valid if limited in the deed creating the power." He then refers to *Massey v. Barton* (1), and

M. R. says: "The test of the validity of the estates raised is to place them
 1904. in the deed creating the power, in lieu of the power itself. Thus,
In re if by a settlement an estate be limited to A for life, remainder to
 HALLINAN'S TRUSTS. his children as he shall appoint, and he afterwards appoint to a
 son born subsequently to the settlement for life, remainder to the
 children of that son as purchasers; read the limitations as if inserted
 in the settlement in the place of the power, and they will stand
 thus: to A for life, remainder to his unborn son for life, remainder
 to the sons of that son as purchasers. Now, the limitation to the
 grandchildren would have been void if contained in the settle-
 ment; and therefore it cannot be sustained as a due execution of
 the power. But it is important in these cases to consider whether
 the power was *created* by will or deed: this speaks from the execu-
 tion of it; that from the death of the testator: so that in the case
 of a power *created* by will, children born in the testator's lifetime,
 though *after his will*, stand in the same situation as children born
 at the execution of the deed where the power is created by deed."
 "We must be careful," he says, "not to destroy this distinction
 by extending it to an instrument *executing* a power; for whether
 the power be executed by deed or will, the limitation, in regard to
 the question of perpetuity, must receive the same construction.
 The point of inquiry is the instrument *creating*, and not the
 instrument *executing* the power."

The only case he refers to in support of the general proposition
 is *Massey v. Barton* (1), and *Massey v. Barton* (1) was a decision
 of Mr. Blackburne when Master of the Rolls. That case goes
 the whole length of the statement in Lord St. Leonards' book:
 but, curiously enough, Lord St. Leonards relies on *Massey v.*
Barton (1) in support of his statement of the law, and *Massey*
v. Barton (1) seems to have been decided on the authority of
 the *dictum* in Lord St. Leonards' book. The suit of *Massey v.*
Barton (1) was brought for the purpose of taking the opinion
 of the Court on a question which arose upon the marriage
 settlement and will of Mr. George William Massey, who was
 the father of the plaintiffs in the action. In his judgment the
 Master of the Rolls says:—"In this case a pecuniary fund was

vested in trustees on the marriage of George William Massey, the father of the minors, with Miss Narcissa S. Barry, in trust for him and his lady for their lives, which trusts have ceased by their deaths; and subject to their life estates, as to the principal money, on trust for the issue of the marriage in such shares and proportions, and at such times and with such benefit of survivorship, as George W. Massey should by his last will and testament, attested by two witnesses, appoint; and in default of appointment, to be equally divided between them; the shares of such of them as should be sons to become vested interests on their attaining the ages of twenty-one years. There were three sons, the only issue of the marriage, who are plaintiffs in the cause; and two of them having attained the age of twenty-one years, apply to be paid their shares of the fund. It appears that Mr. Massey made a will attested as the power required, and bequeathed the fund amongst his children, but not to be paid until they attained their respective ages of twenty-five years, and not before: this postponement is contended to be void by the two sons who make the present application. This is the case of a particular power restricted as to its objects to the children of the marriage." Then he quotes Sir Edward Sugden, and says: "Adopting this test, the result would be, that by this settlement the fund would be limited to the issue of the marriage then unborn, on the death of the father; but would not become vested for a period that *might* exceed twenty-one years from the time of his death; such a limitation would be clearly void for remoteness: *Lade v. Holford* (1), and *Proctor v. Bishop of Bath and Wells* (2); in which latter case a devise to the eldest unborn son of the testatrix's grandson, who should be bred a clergyman and be in holy orders, was held to be void, as he could not be in orders until twenty-four years of age; until which time there was, therefore, a possible suspense of property."

In that case, which was heard in November, 1844, George William Massey had died nine years before, but the dates are not given in reference to the objects of the power at all, and I only take the decision as being a general statement of a general

M. R.
1904.

In re
HALLINAN'S
TRUSTS.

(1) Amb. 479.

(2) 2 H. Bl. 358.

M. R. 1904. *In re* HALLINAN'S TRUSTS. proposition, Oddly enough (and I mention it merely as matter of curiosity), I find a note of mine, made years ago, in my own copy of the report: "*Query* as to this case," and setting out reasons—"In 1835 two, and most probably all, of the sons were upwards of twelve years old, and to give them the fund upon their attaining twenty-five was merely, in other words, to give it to them provided they should be living respectively in thirteen years to be computed from that time. . . . The mistake appears to be in confounding a limitation in the settlement to *any* son who should attain twenty-five—which might or might not be within the rule against perpetuities, and the limitation to ascertained sons who must attain the vesting age within that period." In this case the gift is "unto my daughter, Maude Beatrice Hallinan, on her attaining the age of twenty-five years."

The matter is not very clear; and, in his extremely able argument, Mr. Clery relied very largely on *Wilkinson v. Duncan* (1), which might at first sight appear to be quite undistinguishable from the case before me. It was a question about a will, but I find that it was not decided on any such ground. *Massey v. Barton* (2) was not referred to. The view the Master of the Rolls took was this. He says (p. 117): "The view I take of the case generally is that which I have stated, viz. where the share of each person is ascertained, the gifts to those who happen to be within the limits of the rule against perpetuity may be good as to them, though the gifts be invalid as to the others who are beyond that limit, because the number and amount of the shares are ascertained at the proper period, and within the proper limit of time." He looked into the matter further, and in a supplemental judgment he says: "I think this will afford instances of both the rules stated by Vice-Chancellor Wood. In the gift to the daughters a sum is specifically given to each, which is not dependent on the gift to the others, and consequently those will take it who can take it within the time allowed by the law against perpetuities. With respect to the gift to the sons, it illustrates the other rule. I am of opinion that it is a gift to a class which cannot be ascertained until all the members of it shall

(1) 30 Beav. 111.

(2) 7 Ir. Eq. R. 95.

have attained twenty-four, and, therefore, with respect to them, the appointment of the residue is wholly void for remoteness. With respect to the daughters, as the number of sums of £2000 were ascertained at the death of the nephew, I think that those who attain their age of twenty-four within the period of twenty-one years from the death of the nephew are entitled to their shares, and the residue will go as unappointed." That case was one no doubt in which the question arose upon a power created by will; but the simple question which arose for decision was whether what were good gifts in exercise of the power in reference to the actual attainment of twenty-four within the limit of twenty-one years were bad, because the appointment was not restricted to the age of twenty-one, after lives in being at the creation of the power.

M. R.
1904.

In re
HALLINAN'S
TRUSTS.

Von Brockdorff v. Malcolm (1) was also a case of the exercise of a special power of appointment, and it was held that an appointment "upon trust for all and every my daughters and daughter who shall survive me, and shall, either in my lifetime or after my decease, attain the age of twenty-four years, and if more than one, in equal shares as tenants in common," was not void for remoteness. The discussion of the case and judgment were largely cognizant with a different question, viz., as to whether there was an exercise of the power at all; but the question as to remoteness was argued as a subsidiary matter, and Cozens-Hardy, J., puts it this way:—"All the limitations to children are void, as in the case of daughters they might possibly be too remote. A daughter might not attain twenty-four till more than twenty-one years after the death of the testator. The gift is to a class, and, if part of it is void, the whole is void: *Pearks v. Moseley* (2)." Then Mr. Wright, who appeared for the trustees, says: "The youngest child was three years old at the time of the testator's death. The class of children must, therefore, be ascertained within twenty-one years from his death: *Wilkinson v. Duncan* (3). The gift is therefore good, and the point which was decided in *Pearks v. Moseley* (2) did not arise. It is immaterial whether the gift is to a class or individuals. The state of things at the time of the testator's death must be looked at. The daughters take

(1) 30 Ch. D. 172.

(2) 5 A. C. 714.

(3) 30 Beav. 111.

M. R.
1904.
In re
HALLINAN'S
TRUSTS.

absolutely ; the direction to settle their shares is of course void ;” and Pearson, J., says : “ I think that *Wilkinson v. Duncan* (1) applies, and that the appointment is not void for remoteness.” The result follows that whether the power is created by will or deed, if it is exercised in favour of a person named or described, and if it be directed to vest at a period exceeding twenty-one years after a life in being, but must in the nature of things actually vest before the expiration of twenty years after the determination of the life in being at the creation of the power, in that case there is a good exercise of the power, and I so hold in this case.

R. W. L.

Appeal.
June 10, 13.

Frances Hallinan appealed to the Court of Appeal (FitzGibbon, Walker, and Holmes, L.JJ.).

O'Connor, K.C., and *Russell*, for the appellant.

Matthew Bourke, K.C., and *A. E. Clery*, for Maude Beatrice Hallinan.

P. Fleming, K.C., and *G. C. Green*, for the trustees.

THE COURT affirmed the decision of the Master of the Rolls, and dismissed the appeal.

Solicitors for Maude Beatrice Hallinan : *Dealy & White*.

Solicitors for the other children of the marriage : *O'Reilly & Sons*.

Solicitors for the trustees of the settlement : *M. J. Horgan & Son*.

G. Y. D.

IN THE MATTER OF THE ESTATE OF WILLIAM L. BOBBETT AND JOSEPH BOBBETT, OWNERS; AGNES NUGENT, PETITIONER.

Ross, J.
1904.

April 27.
May 3, 4, 6,
7, 18.

Conflicting equities—Priority—Equitable mortgage—Subsequent legal mortgage—Lis pendens—Locke King's Act—Breach of trust not amounting to fraud—Cestui que trust bound by acts of trustees.

A died seized and possessed of lands, including a denomination X, and indebted to his Bank in a sum of £10,000, to secure which all his title deeds, including those of X, had been deposited with the Bank by way of equitable mortgage. A made a will, whereby, in effect, X became the property of his eldest son B. He left other lands to his two younger sons and pecuniary legacies of £1000 each to his three daughters, one of whom was the petitioner. He appointed B and two others executors and trustees, to whom probate was granted. Within nine months after his death the executors paid off the testator's debt to the Bank, and obtained the title deeds, giving a receipt to the Bank for them; but on the same day the title deeds of X were re-deposited by B with the Bank to secure a past debt of his own and future advances. Upon this large advances were made by the Bank to B, far more than sufficient to exhaust the value of X. A suit, instituted in the Chancery Division to establish the right of the legatees to be paid out of X, was registered as a *lis pendens*, and immediately afterwards the Bank took a legal mortgage of X from B:—

Held, that, under Locke King's Act, as each payment was made an equity arose in favour of the legatees in the nature of an equitable charge against X, to be recouped the amount necessary for payment in full of the legacies which the remaining personal estate was insufficient to discharge.

But *held* also, following *In re Ffrench's Estate* (21 L. R. Ir. 283) and *In re Sloane's Estate* ([1895] 1 I. R. 146), that the conduct of the trustees, though constituting a breach of trust, was not fraudulent, and that, irrespective of the legal mortgage, the Bank, as purchasers for value without notice, obtained by their equitable mortgage priority over the earlier equitable charge of the legatees.

Shropshire Union Railways and Canal Co. v. Reg. (L. R. 7 H. L. 496) distinguished.

OBJECTION by the petitioner to the draft final schedule of incumbrances which, as settled by the examiner, gave priority to

Ross, J.
1904.

In re
BOBBETT'S
ESTATE.

the equitable and legal mortgages held by the National Bank on the lands of Navanstown, county of Meath, over the petitioner's claim under the judgment of the Right Honourable the Vice-Chancellor, dated the 8th May, 1901, in the action of *Bobbett v. Bobbett*.

William Bobbett, deceased, father of the owner and of the petitioner, was in his lifetime a farmer on an extensive scale in the county of Meath, and at the time of his death, which occurred on the 28th March, 1888, was possessed of, and entitled to, several valuable farms in the county of Meath, including the lands of Navanstown with which the objection in the present case was conversant. He also left considerable personal estate chiefly consisting of cattle, and a policy of insurance on the life of His Majesty King Edward VII. He had made a will dated the 21st August, 1884, and three codicils thereto, under which his eldest son, William Lawrence Bobbett, became entitled to Navanstown; other farms were devised to his younger sons, Joseph and Thomas Walter, and legacies of £1000 each, payable at twenty-one years of age or marriage, were bequeathed to three of his daughters, Elizabeth, Agnes (the petitioner in the present matter), and Helen. The three sons were named residuary devisees and legatees. The testator appointed his son, William Lawrence Bobbett, his son-in-law, Matthew Lee, and Hubert C. West, a solicitor, trustees and executors of his will, to all of whom probate was granted.

All the interest of Thomas Walter Bobbett was subsequently acquired by Joseph Bobbett.

The personal estate of the deceased was amply sufficient to have paid the pecuniary legacies and his unsecured debts, which were small in amount. The testator was, however, at the time of his death indebted to the National Bank in a sum of £10,000, as security for which they held the title deeds of all his lands, including Navanstown.

The executors realized all the testator's personal estate, except the policy of insurance, and out of the proceeds discharged, by instalments, the testator's debt to the Bank, the last instalment being paid on the 5th January, 1889. On the 13th November, 1890, the three executors called at the Bank, and got up all the title deeds. On the same day William Lawrence Bobbett re-

deposited the title deeds of Navanstown with the Bank to secure all sums then due by him personally to the Bank or thereafter to become due. At the date of the present proceedings, upwards of £15,000 was claimed by the Bank to be due on this security, far exceeding the value of the lands, which were estimated as worth, at most, about £5000. The only evidence forthcoming as to what occurred at this interview was the security book of the Bank. The then joint-managers, as well as Lee and West, were deceased; and William Lawrence Bobbett, who was in completely insolvent circumstances, was unable to give any coherent account of what precisely occurred, and was not examined.

The daughters of the testator were all under the age of twenty-one at the time of his death. When Elizabeth came of age in December, 1888, she asked for payment of her legacy, and was met with unsatisfactory excuses. She then commenced an action in the Chancery Division on the 16th June, 1891, against the three executors and Joseph and Thomas Walter Bobbett, seeking for the administration of the testator's real and personal estate, a special inquiry as to what portion of the personal estate was applied in discharging sums primarily payable out of the lands, and a special declaration that the lands were bound to recoup the personal estate in the amount so applied. Navanstown was specifically mentioned in the statement of claim as part of the lands against which relief was sought. The action was registered as a *lis pendens* on the 16th June, 1891, and duly re-registered. On the 6th July, 1891, William L. Bobbett executed a legal mortgage of Navanstown to the Bank. Defences were delivered in *Bobbett v. Bobbett*, and the action came on for trial, when the Vice-Chancellor on the 21st November, 1891, ordered the administration of the real and personal estate, and directed the special inquiry in the terms prayed for by the statement of claim. Before the accounts were taken at Chambers, the executors paid Elizabeth Bobbett her legacy with interest and costs, and no further proceedings were taken in the suit until Agnes Bobbett came of age in 1898. She married James Nugent, and they in turn applied to be paid, but without success. On the 3rd July, 1899, Mrs. Nugent applied for, and obtained, carriage of the proceedings in *Bobbett v. Bobbett*. The accounts were taken, and the Chief Clerk certified

Ross, J.
1904.

In re
BOBBETT'S
ESTATE.

Ross, J.
1904.

In re
BOBBETT'S
ESTATE.

that William L. Bobbett and Hubert C. West, the surviving executors and trustees (Lee having previously died), were indebted to the testator's estate in respect of the personal estate in a sum of £5926 8s. 7d., and in respect of rents and profits of the real estate received by them in a further sum of £2928 6s. 1d., and that £10,000, primarily payable out of the real estate, or chattels real, specifically bequeathed, had been paid by the executors out of personal estate not specifically bequeathed.

By his judgment, on further consideration, dated 8th May, 1901, the Vice-Chancellor *inter alia* declared that the lands comprised in the equitable mortgage from the testator William Bobbett to the National Bank were bound to recoup the testator's personal estate for all sums paid thereout on foot of the said equitable mortgage, amounting to £10,000, and he ordered the said lands, including Navanstown, to be sold in the Court of the Land Judge. By consent of the Bank, who had a claim thereon as equitable mortgagees for executorial expenses, the policy of insurance was also ordered to be sold, the surplus proceeds of sale after satisfying the Bank's claim to be brought into Court. This was afterwards done, and the net surplus paid in part satisfaction of the legacies to Mrs. Nugent and Helen Bobbett, leaving about £700 still due to each. Though the Bank appeared by counsel at the hearing on further consideration, with reference to the policy, it was admitted in the present argument that they were not, as regards any other matters, bound by the proceedings in *Bobbett v. Bobbett*.

The petition in the present matter was accordingly presented, and an absolute order for sale was made.

Jellett, K.C. (with him *W. Green*), for the objector :—

1. As between mere equitable titles the earlier in point of time prevails, and the maxim *qui prior est tempore, potior*, or rather *potentior, est jure* applies.

An equitable mortgage is always an innocent transaction, the mortgagee acquiring only what the mortgagor had equitably power to give : *Pillgrem v. Pillgrem* (1) ; *Stackhouse v. Jersey* (2) ;

Queale's Estate (1), a case in its facts closely resembling the present, *Connolly v. The Munster Bank* (2).

Ross, J.
1904.

Here, as each payment was made by the executors out of the personal estate (the proper fund for payment of the legacies) in ease of the mortgaged lands, an equity to be recouped a like amount out of the lands, constituting an equitable charge on them, at once arose under Locke King's Act, 17 & 18 Vict. c. 113. There was no need of any proceeding in any Court to create such a charge. It arose automatically, like as on the payment of charges on the inheritance by a tenant for life. As more than sufficient to pay the legacies was discharged out of the personal estate, which thereby became deficient, the Bank, as far as their equitable security is concerned, must take subject to the legacies.

In re
BOBBETT'S
ESTATE.

2. But it is said the Bank improved their position and got in the legal estate—the *tabula in naufragio*—by their mortgage of the 6th July, 1891. But they were not competent to alter their position at that time, because the *lis pendens* had been registered. Though this was not notice, it stereotyped the position of the parties. Pending suit, no party to the action can dispose of the subject-matter of litigation, at all events to anyone not a party to the suit, except subject to its result: *Bellamy v. Sabine* (3); *Tyler v. Thomas* (4); *Price v. Price* (5).

Herbert Wilson, K.C. (with him *A. C. Meredith*), for the National Bank :—

Had *Cave v. Cave* (6) continued to be law, there would perhaps be much to be said in favour of the objector's contention. But *Cave v. Cave* (6) has been definitely overruled. The present case is governed by *In re Ffrench's Estate* (7), in which the decision of *Monroe, J.*, was reversed by the Court of Appeal, and by *In re Sloane's Estate* (8), in which *Monroe, J.*, followed the decision of the Court of Appeal in *In re Ffrench's Estate* (7). Priority in point of time, even as between equitable estates, is only decisive where

(1) 17 L. R. Ir. 361.

(2) 19 L. R. Ir. 112.

(3) 1 De G. & J. 566.

(4) 25 Beav. 47.

(5) 35 Ch. D. 297.

(6) 15 Ch. D. 639.

(7) 21 L. R. Ir. 283.

(8) [1895] 1 I. R. 146.

Ross, J.
1904.

In re
BOBBETT'S
ESTATE.

all other equities are equal: *Rice v. Rice* (1). Here the Bank, even independent of their legal mortgage, were purchasers for value without notice, which gives them priority, even supposing the legatees acquired any charge upon the lands before the Vice-Chancellor's judgment was pronounced, which we do not at all admit. Of course, if our legal mortgage is not affected by the *lis pendens*, the Bank's position is impregnable.

The legatees are volunteers, and are bound by the acts of those whom their testator chose to entrust his property to as executors and trustees. As volunteers the equity of the legatees is in any view of the case inferior to that of the Bank, who were innocent purchasers throughout, although they would have been justified in taking their legal mortgage, even if they had in the interval acquired notice of the legatees' claim.

A. C. Meredith:—

1. Locke King's Act does not apply, for there is a contrary intention shown by the will. [Counsel analysed the will.]

2. Assuming Locke King's Act does apply, the Bank's claim is entitled to priority for these reasons:—

(a) The petitioner's claim on the 13th November, 1890, was an equity merely as distinguished from an equitable interest, an incomplete right as distinguished from a complete right. The petitioner's right was not perfected till 8th November, 1901, the date of the judgment on further consideration: *Ffrench's Estate* (2); *Sloane's Estate* (3). The Bank's claim on the 13th November, 1890, was an equitable interest: *Rice v. Rice* (1).

(b) The conduct of the executors in giving up the deeds which they got to the specific devisee postponed their equity: *Layard v. Maud* (4); *Ferrand v. Yorkshire Banking Co.* (5); *Kelly v. Munster and Leinster Bank* (6).

(c) The Bank by getting in the legal estate—the *tabula in naufragio*—on the 6th July, 1891, even *pendente lite*, secured priority: *Wortley v. Birkhead* (7); *Bates v. Johnson* (8); *Taylor v. Russell* (9);

(1) 2 Drew. 73.

(6) 29 L. R. Ir. 19.

(2) 21 L. R. Ir. 283, at p. 312.

(7) 2 Ves. Sen. 574.

(3) [1895] 1 I. R. 146, at pp. 161–

(8) Johns. 304.

(4) L. R. 4 Eq. 397, at p. 406. [165.

(9) [1892] A. C. 245.

(5) 40 Ch. D. 189.

Bailey v. Barnes (1); see also *Blackwood v. London Chartered Bank of Australia* (2).

The *lis pendens* cannot be placed higher than notice, and, assuming that the Bank had no notice on the 13th November, 1890, and only got such on the day of the registration of the *lis*, they would be protected by the acquisition of the legal estate on the 6th July, 1891. See Sugden, V. and P., 14th ed., p. 738.

Ross, J.
1904.

In re
BOBBETT'S
ESTATE.

At the conclusion of Mr. Meredith's argument, Mr. Justice Ross intimated that he was of opinion that Locke King's Act applied.

Michael J. Dunn, for Joseph Bobbett:—

My client is the person most interested in this question, for if the objection be overruled, his property will be liable to the balances due on foot of the legacies. I rely on Mr. Jellett's argument. I only wish to emphasize that the Bank took their security for a past debt due by the executor William Lawrence Bobbett, who was committing a fraudulent breach of trust for his own benefit.

Miles Kehoe, K.C., for William L. Bobbett, stated, as already mentioned, that his client had no recollection of what had occurred at the interview with the Bank manager on the 15th November, 1890. He believed that he only intended to give a security on his own interest, without prejudicing his sisters or anyone else.

W. Green, in reply:—

In *Ffrench's Estate* (3) the Master of the Rolls and the Lords Justices were careful to restrict the principle of binding *cestuis que trustent* by the misconduct of trustees to the case of delay or neglect by the latter: see *per* Porter, M.R., p. 311; *per* Fitz-Gibbon, L.J., p. 319; *per* Barry, L.J., p. 336. In that case the trustees had, it is true, committed a breach of trust in allowing the trust fund to get into the hands of the tenant for life, and were further guilty of negligence in not recovering it, or obtain-

(1) [1894] 1 Ch. 25. (2) L. R. 5 P. C. 92. (3) 21 L. R. Ir. 283.

Ross, J.

ing proper security. But the *cestuis que trustent* were also guilty of negligence. They were adult very many years before action brought (p. 337). There was nothing to prevent them in the lifetime of Martin French taking steps to have the trust fund secured (*ibid.*). *Sloane's Estate* (1) was also a case of negligence as distinguished from fraud (see p. 165). Monroe, J., while implicitly obeying the principles laid down by the Court of Appeal, certainly did not mean to extend them, although the implicit obedience resulted in a *reductio ad absurdum*. The injustice worked in a case like *Sloane's Estate* (1) is revolting.

But no equitable title can have a foundation in fraud; and where the subsequent equity is created by the fraud of executors or trustees, the *cestuis que trustent* are not bound: *Shropshire Union Railways and Canal Co. v. Reg.* (2); the principle laid down in which has been applied in two subsequent cases—*Carritt v. Real and Personal Advance Co.* (3); *In re Richards*; *Humber v. Richards* (4); see also the earlier cases of *Cory v. Eyre* (5) and *Hill v. Simpson* (6). In *Mumford v. Stohwasser* (7) Sir G. Jessel expresses the opinion, at p. 563, that the fraudulent conveyance even of the legal estate by a trustee would not confer a title upon an innocent purchaser. Here the Bank's contention can only be maintained by attributing a gross fraud to the trustees and executors. William L. Bobbett, according to their view, was using his fiduciary position to obtain the money which he squandered at the expense of the infant legatees: the other two, one of whom was a solicitor, if they did not share in the plunder, aided and abetted their co-trustee in his perpetration of this gross fraud. This is not a case of merely constructive notice to the Bank. If, as we submit, the operation of Locke King's Act creates a charge or lien in favour of the legatee, as each successive payment out of the personal estate was made, the Bank had actual notice of this charge. To release or abandon it was a *devastavit*. The Bank were bound, in taking a security under such circumstances, to adopt the precautions which any ordinary lender would have taken, namely, to see

(1) [1895] 1 I. R. 146.

(2) L. R. 7 H. L. 496.

(3) 42 Ch. D. 263.

(4) 45 Ch. D. 589.

(5) 1 De G. J. & S. 149.

(6) 7 Ves. 152.

(7) L. R. 18 Eq. 556.

that this prior charge was legitimately got rid of before advancing their money, or else to deal with the security offered as *sub onere*, and to limit their advances accordingly. In *Ffrench's Estate* (1) and *Sloane's Estate* (2) there was only an inchoate equity, which was not perfected by any judgment before the equitable mortgages—to Tyrrell in the first case, and to the Bank in the second—were made.

William L. Bobbett had, upon the figures in this case, a substantial interest, subject to his contribution under Locke King's Act. Joseph, whose property was also cleared, would have been liable to contribute. What is there to show that the deceased manager was not acting honestly in accepting the security subject to the known burden, as the Court of Appeal, in *In re Queale's Estate* (3), held was the only honourable and fair construction to be affixed to a similar transaction? Why is this Court to elect to place a fraudulent aspect on what may have been an honest dealing because a subsequent manager made these excessive advances (totally out of proportion to the property mortgaged), and obviously upon other grounds, which have not been disclosed?

Rice v. Rice (4) was, so far as the facts were concerned, a plain case. The plaintiff, by signing the indorsed receipt, put into the hands of the purchaser the means of imposing upon others. *Layard v. Maud* (5), *Farrand v. Yorkshire Banking Co.* (6), and *Kelly v. Munster and Leinster Bank* (7), were all cases of personal negligence on the part of owners of property against whom the title of an innocent purchaser was held to prevail.

As to the conveyance of the legal estate, the only cases in which parties to a suit have been allowed to alter their position *pendente lite* are cases of tacking, the principle of which is explained by Lord Northington in the old case of *Belchier v. Butler* (8). This was the basis of the decisions in *Wortley v. Birkhead* (9) and *Bates v. Johnson* (10), the Vice-Chancellor, in the latter case (at p. 316), guarding himself from countenancing the

ROSS, J.

1904.

In re
BOBBETT'S
ESTATE.

(1) 21 L. R. Ir. 283.

(2) [1895] 1 I. R. 146.

(3) 17 L. R. Ir. 361.

(4) 2 Dr. 73.

(5) L. R. 4 Eq. 397.

(6) 40 Ch. D. 182.

(7) 29 L. R. Ir. 19.

(8) Eden, 453.

(9) 2 Ves. Sen. 571.

(10) Johns. 304.

Ross, J.
1904.

In re
BOBBETT'S
ESTATE.

doctrine that a trustee of the legal estate may confer a title by conveying it in breach of trust. In *Bailey v. Barnes* (1) neither the first mortgagee, in whom the legal estate was vested, nor Lilley, the *puisne* mortgagee, who paid him off, was a party to the suit, and Lilley submitted his rights to the jurisdiction of the Court. It was also a case of tacking. In *Taylor v. Russell* (2) there was no *lis pendens*. In *Blackwood v. London Chartered Bank of Australia* (3) the transfer was made before suit, conferring a legal right. That case also turned so much upon Colonial law that it can be hardly applied to an English or Irish case. The question of *lis pendens* was not even glanced at in the argument of the counsel for the appellant.

May 18.

Ross, J.:—

The question before me arises on an objection to the Final Schedule. The objector seeks to displace an equitable mortgage by deposit of title deeds made on 13th November, 1890, and a mortgage by deed dated 6th July, 1891.

The facts are shortly as follows:—The lands of Navanstown, in respect of which the present question arises, were the property of William Bobbett, the father of the present owners. By his will and codicil he devised these lands to his son, Thomas Walter Bobbett; but he gave his son, William L. Bobbett, power to elect to take these lands in exchange for others to which he was entitled. The testator bequeathed the following pecuniary legacies:—£1000 to his daughter, Elizabeth Bobbett; £1000 to his daughter, Agnes Nugent, otherwise Bobbett, the petitioner; and £1000 to his daughter, Helen Bobbett. He appointed his three sons, William L. Bobbett, Joseph Bobbett, and Thomas Walter Bobbett, his residuary legatees. He appointed his son, William L. Bobbett, Matthew Lee, and Hubert C. West his executors. He also devised and bequeathed all his property to these executors, to hold on the trusts appearing in his will and codicil.

The testator died on 28th March, 1888, and probate was granted to the three executors. William L. Bobbett elected to take the lands of Navanstown. The testator was indebted to the

(1) [1894] 1 Ch. 25. (2) [1892] A. C. 244. (3) L. R. 5 P. C. 92.

National Bank in a sum of £10,000 at the time of his death. To secure this sum, he had deposited his title deeds with the Bank, including the title deeds of Navanstown. The testator's executors and trustees paid off the debt of £10,000 out of the testator's personal estate. The Bank thereupon handed over the title deeds to the executors and trustees. They handed the title deeds of Navanstown to William L. Bobbett. William L. Bobbett then lodged the deeds of Navanstown to secure his own current account with the Bank. Under the statute known as Locke King's Act (17 & 18 Vict. c. 113), unless the testator has by his will, deed, or other document signified a contrary intention, the devisee takes the lands under such circumstances subject to the mortgage. It has been argued that a contrary intention is to be found in the testator's will. For reasons given in the course of the argument, which it would be unprofitable to repeat, I am against that contention. Therefore, inasmuch as the personal estate has been applied in satisfaction of the charges on the real estate, the chargeants on the personal estate, and other persons interested therein, claim to stand in the shoes of the paid-off mortgagees, and to be reimbursed out of the real estate.

Ross, J.
1904.

In re
BOBBETT'S
ESTATE.

In the year 1891 a suit was instituted in the Court of the Vice-Chancellor, in which Elizabeth Bobbett, one of the legatees, was plaintiff, and the surviving executors and the devisees and residuary legatees were defendants. The plaintiff sued, on behalf of herself and the other persons interested in the personal estate, to have the personal estate administered, and to have certain inquiries made in respect of the real estate. A decree was made substantially granting the relief claimed, and directing the inquiries. It appears that Elizabeth Bobbett obtained payment of her £1000. On the 3rd July, 1899, the present petitioner obtained carriage of the suit. A decree on further consideration was made on the 8th May, 1901, and the Court declared the lands liable to recoup the personal estate, and ordered the lands to be sold, giving carriage of the sale to the petitioners. The Bank are not bound by anything decided in that suit; but, after hearing their argument in this case, I altogether concur in what was manifestly the view of the Vice-Chancellor.

We now come to the substantial question in the case. I think

Ross, J.
1904.

In re
BOBBETT'S
ESTATE.

it unnecessary for me to review the many authorities cited by the learned counsel. The judgments of the Court of Appeal in *Ffrench's Estate* (1) and of Mr. Justice Monroe in *Sloane's Estate* (2) have sufficiently settled the principles applicable to this case.

It is a case of conflicting equities. There is the equity of priority of time. There is the equity founded on the conduct of the parties, and the equity that arises from the possession of the title deeds, the symbols of ownership.

As regards time, the petitioner has the advantage. The moment that the personal estate was applied in payment of the charge of the Bank, her lien on the lands came into existence.

But priority in point of time is of no great weight as against other equities.

We have next to consider the conduct of the parties. The executors and trustees of the will come to the Bank, pay off the charge, and receive the deeds. They are the proper parties to pay off the charge and to receive the deeds. If they had retained the deeds in their possession, the petitioner's lien would have been safe. But they do not retain them all. They hand over the deeds of Navanstown to William L. Bobbett, the devisee; they bestow on him the symbols of ownership. They equip him with the means of obtaining an advance from the Bank. That this act was a breach of trust admits of no doubt. There is no evidence, however, that it was done for the purpose of enabling William L. Bobbett to defraud the legatees or the Bank. If it were a case of fraud, different considerations might apply. There is no evidence in this case to warrant me in inferring that it was anything more than a mistake. The immediate result of the negligence was that William L. Bobbett was able to represent himself as owner, and to raise money on the deeds deposited. Now, if the beneficiaries had themselves handed over the deeds to William L. Bobbett, they could hardly be listened to. They would have deliberately abandoned their lien. Does it make any difference that the act was done by their trustees? I am not sure that in all cases beneficiaries are bound by the acts of their trustees, where a breach of trust has been committed. But in this case it appears

(1) 21 L. R. Ir. 297.

(2) [1895] 1 I. R. 146.

to me they are clearly bound. The legatees take as volunteers under the testator's will. The testator is responsible for his own executors and trustees. If he chose negligent persons, it is just that the loss should fall on his legatees rather than on the innocent strangers who advanced their money to the man who held the title deeds.

But it is said the Bank were not innocent strangers. They were aware that they were being paid off by executors and trustees. They were—as it is said—put upon inquiry. What kind of an inquiry could the Bank have been expected to make? It must have been an inquiry covering the whole administration of the estate. They were paid off by the proper hand. They had no reason to suspect a breach of trust or any fraud. They received the deeds from the owner, and naturally concluded that the executors and trustees had no claim upon them.

I, accordingly, decide that the Bank have the better equity, and overrule the objection.

It becomes unnecessary for me to express any opinion on the other questions that have been so ably argued before me in this case.

Solicitor for the petitioner (objector) : *M. G. Foley.*

Solicitor for the National Bank : *W. H. Dunne.*

Solicitor for Joseph Bobbett : *Brady.*

Solicitor for William L. Bobbett : *Clarke.*

W. C. S.

Ross, J.
1904.

In re
BOBBETT'S
ESTATE.

Ross, J. IN THE MATTER OF THE ESTATE OF JOHN FRANCIS
1904. BOMFORD, OWNER; ROBERT NEVILLE, PETITIONER.

March 1.

Appeal.

May 9, 10.

*Quit rent—Covenant to pay—Payment for years by persons not liable—
Presumption of lost grant.*

By indenture of 23rd June, 1703, the Trustees of Forfeited Estates conveyed to D. the lands of Clonfad, Rattin, and Ballyoughter, in the county of Westmeath, in fee, subject to payment of the quit rent of £12 13s.

In 1708 H. (in whom D.'s interest in the lands was vested) granted to B. the lands of Clonfad, in fee, subject to the rent of £135 over and above taxes, except quit rent, which H. covenanted to pay. In 1710 H. granted to B. the lands of Rattin, subject to the rent of £80, with the same provision as to quit rent, which H. covenanted to pay.

Since 1780 the quit rent payable in respect of Rattin and Clonfad had been paid by the successive owners of the grantee's interest under the fee-farm grants of 1708 and 1710 :—

Held, that in the absence of any explanation of these payments being made by parties not liable thereto for so long a period, a lost grant must be presumed. Decision of Ross, J., affirmed.

MOTION, asking for a declaration that, as between the owner John Francis Bomford and Major Lionel Hewson, the head landlord of the lands ordered to be sold, the said John Francis Bomford, or his estate in the lands held under the fee-farm grant of 23rd February, 1708, is not liable to payment of £12 13s. 0¾d. quit rent, payable to the Commissioners of Woods and Forests, reserved by the fee-farm grant of 23rd June, 1703. Major Hewson consented to the question being thus determined.

By indenture dated the 23rd June, 1703, the Commissioners of Forfeited Estates in Ireland granted to Ephraim Dawson the lands of Clonfad, containing 581A. 3R. 16P. profitable land, plantation measure, and 114 acres of bog; the lands of Rattin, containing 227A. 2R. profitable land, like measure, and 154 acres of bog; and the lands of Ballyoughter, containing 474 acres profitable land, like measure, and 305 acres of bog, all situate in the county

of Westmeath, in fee-simple, subject to the annual quit rent of £12 13s. 0¾d.

Ross, J.
1904.

In re
BOMFORD'S
ESTATE.

By indenture dated the 23rd February, 1708, Francis Heaton (in whom the grantee's interest had become vested) made to Thomas Bomford a fee-farm grant of the lands of Clonfad, containing, according to the Down Survey, 721 acres plantation measure, subject to the rent of £135 Irish currency (equivalent to £124 12s. 4d. sterling) over and above all taxes, quit rent and Crown rent only excepted, which the said Francis Heaton covenanted to pay.

This rent of £124 12s. 4d. was now payable to Lionel Hewson.

By indenture dated the 23rd November, 1710, Francis Heaton made to said Thomas Bomford a fee-farm grant of the lands of Rattin, containing 284 acres (Irish), subject to the yearly rent of £80 Irish currency (equivalent to £73 16s. 11d. sterling) over and above taxes except quit rent, which Francis Heaton covenanted to pay.

In 1740 all the lands comprised in the grant of the 23rd February, 1708, together with the adjoining townland of Rattin, were vested in Thomas Bomford; and by indenture dated the 17th January, 1740, Thomas Bomford granted to James Tyrrell the lands of Rattin, and part of Clonfad, containing in the whole 634A. 2R., Irish plantation measure in fee simple, subject after the death of Thomas Bomford to the rent of £250 for ever, and the deed contained a proviso enabling the said James Tyrrell to fine down the rent on payment of 1s. an acre at seventeen years' purchase of the same. This rent was afterwards, in pursuance of this proviso, fined down to the sum of £218 5s. 6d. (Irish currency).

In 1786 John Tyrrell, who was then the owner of the grantee's interest in Rattin and Clonfad, comprised in the grant of the 17th January, 1740, purchased the superior fee-farm rent of £80 (Irish currency) reserved by the grant of the 23rd November, 1710, payable out of Rattin, and this was conveyed to him by indenture dated the 8th September, 1786. John Tyrrell thus became liable to pay to the Bomfords—as representing the grantor in the grant of 17th January, 1740, the rent of £218 5s. 6d. (Irish currency),

Ross, J. and he was entitled to receive from them the rent of £80 (Irish),
 1904. equivalent to £73 16s. 11d. sterling, leaving a balance actually
In re payable to the Bomfords of £138 5s. 6d. For several years
 BOMFORD'S Tyrrell was in the habit of paying the rent of £135 (Irish)
 ESTATE. reserved by the grant of the 23rd February, 1708, to Hewson,
 who was then the superior landlord; he took credit for these pay-
 ments in his account with Bomford, and that left the small balance
 due of £3 5s. 6d.

By indenture dated the 28th September, 1821, Tyrrell conveyed
 to James Fetherston the lands of Rattin and Clonfad, containing
 634A. 2R., and also the fee-farm rent of £80 (Irish) payable out
 of Rattin.

The same method that had been adopted by Tyrrell for pay-
 ment of the rent was continued by Fetherston and his successors.

It appeared from a search in the Quit-rent office that from the
 year 1780 the quit rent of £12 13s. 0 $\frac{3}{4}$ d. was split into two sums
 of £8 3s. 1 $\frac{1}{2}$ d. and £4 9s. 11 $\frac{1}{2}$ d., the former sum being paid in
 respect of Clonfad and Rattin, and the latter out of Ballyoughter.
 The £8 3s. 1 $\frac{1}{2}$ d. was paid from 1780 to 1800 by Stephen Bomford.
 As to the £4 9s. 11 $\frac{1}{2}$ d.—one-half of this sum (£2 4s. 11 $\frac{3}{4}$ d.) was
 stated to be paid up to March, 1780, out of Ballyoughter by
 "tenant"—no name given, and was not again paid till the 11th
 October, 1791, when Stephen Bomford paid one year to Michaelmas,
 1791, and continued paying the rent annually to 1800. Since
 1800, the persons who paid the quit rent—as appeared from the
 ledger in the Quit-rent office—were—

1800 to 1805	George Bomford.
1806 „ 1811	Do.
1813 „ 1818	Do.
1819 „ 1826	George Bomford, now Samuel Dopping.
1832 „ 1833	Mrs. Anne Dopping.
1835 „ 1838	Do.
1839 „ 1841	Do.
1842 „ 1846	Anne Dopping, now George Bomford.
1847 „ 1853	George Bomford, by Samuel A. Reynell.
1854 „ 1859	Do.
1860 „ 1865	Do.
1866 „ 1871	George J. T. Bomford.
1872 „ 1877	John T. Bomford.

In 1839 George Bomford, who was the owner of the lands, questioned his liability to payment of the quit rent, and a letter dated the 26th February, 1839, was proved in evidence, written by his solicitors to Robert Hewson, the superior landlord, to the following effect—

Ross, J.
1904.
In re
BOMFORD'S
ESTATE.

“ We are directed by Mr. George Bomford, of Oakley Park, in the county of Meath (who is the heir and representative of Thomas Bomford, the lessee in the leases of 1708 and 1710, from Francis Heaton, of the lands of Clonfad and Rattin, in the county of Westmeath), to apply to you, as the representative of the landlord's interest in the said lands, for the quit rent which Mr. George Bomford has paid out of said lands for some years past, amounting to £182, and for which we have the quit rent receipts. On reference to said leases you will find that the tenant is exempt from payment of quit rent or Crown rent. We beg you will either agree to settle the amount or refer us to your law agent.”

Some further correspondence ensued, in which it was suggested that a case should be sent to counsel for an opinion as to the rights and liabilities of the parties. It did not appear whether this course was adopted, or what opinion was given; but notwithstanding the fact that Bomford claimed exemption, he continued to pay the quit rent as before.

The interest of the Bomfords in the lands had been in strict settlement for a great number of years. In 1809, on the marriage of George Bomford the elder, the lands were settled on the said George Bomford for life, with remainder to his first and other sons in tail male. In 1832, on the marriage of George Bomford the younger (son of George Bomford the elder), the lands were settled on George Bomford the younger, for life with remainder to his first and other sons in tail male. In 1866, on the marriage of John Francis Bomford, the lands were settled on John Francis Bomford for life with remainder in tail male.

The receiver in this matter paid the quit rent out of the rents in his hands until June, 1903, when his account was surcharged with the amount, and a ruling was made authorising him to call on Major Hewson to pay the amount. Major Hewson refused to pay.

Ross, J.
1904.

Jellett, K.C., in support of the motion.

In re
BOMFORD'S
ESTATE.

Herbert Boyd, for Major Hewson.

Ross, J.:—

This is an application on behalf of the petitioner for an order declaring that, as between the owner, John Francis Bomford, and Major Lionel Hewson, the said John Francis Bomford, or his estate in the land ordered to be sold, is not liable to the payment to His Majesty's Commissioners of the quit rent of £12 13s. 0 $\frac{3}{4}$ d.

By an indenture dated 23rd June, 1703, the trustees of Forfeited Estates in Ireland granted to Ephraim Dawson the lands of Clonfad, Rattin, and Ballyoughter, to hold for ever, subject to the yearly quit rent of £12 13s. 0 $\frac{3}{4}$ d.

On 23rd February, 1708, Francis Heaton, in whom the grantee's interest had become vested, granted to Thomas Bomford part of the said lands of Clonfad, subject to a rent of £135 late currency, payable above all taxes and such like, quit rent, Crown rent, and chief rent only excepted, which the said Francis Heaton bound himself to pay. By a similar grant of 1710 part of Rattin passed to Bomford at a rent of £80.

In the view I take it becomes unnecessary to follow the history of the sub-grants and further dealings with the lands. All Francis Heaton's interest in the grants of 1708 and 1710 is now vested in Major Lionel Hewson, who has submitted to the jurisdiction of the Court, and all the grantee's interest is vested in the present owner. What has occurred is this, that the entire quit rent, that should have been paid by the grantor and his successors, has been paid by the Bomford family since the year 1791. Since the close of the argument the quit rent books have been investigated, and from them it appears that the rent was split into two sums of £8 3s. 1 $\frac{1}{2}$ d. payable in respect of Clonfad and Rattin, and the balance for Ballyoughter.

The £8 3s. 1 $\frac{1}{2}$ d. was paid by the Bomfords up to Michaelmas, 1791; but from that period to the present, the whole rent has been paid by the Bomford family. This goes to negative the possibility of mistake.

Further, in the year 1839 a correspondence took place between the representatives of the Bomford and Hewson families on this very question now before me. It was agreed that the parties should jointly submit a case to counsel. Whether an opinion was actually taken or not, we do not know; but we do know that no change was made: the Bomford family continued to pay the whole charge as before.

Ross, J.
1904.

In re
BOMFORD'S
ESTATE.

What is the effect in law of the uninterrupted payment of this rent for more than a century by parties in no way liable?

On the one hand, I am asked to infer a lost grant, or a supplemental deed altering the relations of the parties.

On the other hand, it is contended that when once the original grant is produced, the parties are bound by its express terms, and that there is no room for any presumption whatever.

The doctrine of lost grant is more or less of a legal fiction. The intention is to give effect to what has been established for a long period of time. The law presumes that what has been notoriously done and acquiesced in for a great number of years has been done of right and not of wrong; and if a deed, a licence, or an agreement were necessary to enable it to be done of right, it will presume the existence at some time of such deed, licence, or agreement. The presumption is not dependent upon the belief that the document had ever in fact existed.

But the presumption can be restricted, and the matter can be explained. If it could be shown that during the period there was no person who had such an estate in the lands as would have enabled him to make such a grant, a jury ought to refuse to infer its existence.

The long usage may be explained by a mistake in the construction of a document, as in the case of *North-Eastern Railway Company v. Hastings* (1). In the case before me, neither method of rebutting the presumption is available. The meaning of the original grant is clear; the words are express.

The fact that throughout the whole of the nineteenth century the Bomford estate was held by successive tenants for life is not enough to induce me to hold that a grant could never have been law-

Ross, J.
1904.

In re
BOMFORD'S
ESTATE.

fully made. Why then should the ordinary inference from long usage not be drawn? Mr. Jellett insists that when the original deed is produced its terms cannot be modified, or altered, by any usage.

The cases do not bear out this contention. I take one of the latest: *Neaverson v. Peterborough Rural District Council* (1). Cozens-Hardy, J., although an award was before him under which the herbage of a road could only be let to a restricted extent, presumed a lost grant in consequence of long usage by virtue of which the restrictions imposed by the award were released.

In *Lefroy v. Walsh* (2) payment of an abated rent for thirty years, unexplained, was held to be evidence from which a jury might infer a surrender of the original lease, and a re-demise at the lower rent. Many other cases have been cited by Mr. Boyd to the same effect. All the evidence in the case leads me to the inference that by some lawful means, or some effective instrument, the quit rent ceased to be payable by the grantor, and became charged on the Bomford estate. I, therefore, refuse the motion, with costs to be paid out of the estate.

W. C. S.

Appeal.
May 9, 10.

The owner appealed (3).

Jellett, K.C., and *J. E. Walsh*, for the appellant:—

The fee-farm grant of 23rd February, 1708, contained a covenant by the grantor to pay quit rent, and user cannot be relied on to eliminate a covenant out of an instrument altogether: *Attorney-General v. Horner* (4); *North-Eastern Railway Company v. Hastings* (5). This is a different case from *Neaverson v. Peterborough Rural District Council* (1), where there was a right to depasture with sheep, and a right to depasture with cattle was presumed from a user for over fifty years.

(1) [1901] 1 Ch. 22.

(2) 1 I. C. L. R. 311.

(3) In the Court of Appeal, before
LORD ASHBOURNE, C., and FITZ GIB-

BON, WALKER, and HOLMES, L.JJ.

(4) 14 Q. B. D. 245.

(5) [1900] A. C. 260.

Again, there cannot be a lost grant where there is not any person entitled to make the grant: *Dawson v. M'Groggan* (1). From 1809 to the present time the estate of the Bomfords has been in strict settlement, and a tenant for life cannot bind the inheritance. It is impossible to find the foundation for a lost grant before 1839, because the correspondence that took place then showed that the parties were all in ignorance of the facts, and no person then set up the claim to a lost grant.

According to the practice adopted by the parties, there was only a very small sum paid annually to Bomford by Tyrrell, £3 5s. 6d. as an adjustment of the whole amount. That was the balance due by Tyrrell, after taking credit for £135 which he paid to Hewson, and the £80 which he was entitled to deduct from Bomford. This method of settling the account drew away the attention of Bomford from the question of liability to quit rent.

Appeal.
1904.

In re
BOMFORD'S
ESTATE.

S. L. Brown, K.C., and Herbert Boyd, for Major Hewson:—

It is a maxim of the law of England to give effect to everything which appears to have been established for a considerable course of time, and to presume that what has been done has been done of right and not of wrong: *Gibson v. Doeg* (2). The Court will presume a legal origin where there is a long-continued usage; *Attorney-General v. Copeland* (3). In *Lefroy v. Walsh* (4) a surrender of a lease and the creation of a tenancy from year to year at a lower rent were presumed from long payment of the lower rent. In *Tennent v. Neill* (5) a release was presumed of a covenant in a lease to pay additional rent, in the event of improvements not being made which the tenant had covenanted to make, and the original rent had been accepted for years. In *Ex parte Raymond* (6), where a lease contained a covenant against alienation, with a proviso for payment of an increased rent in case of breach, and the lessee devised his interest, and the devisee paid the old rent for thirty-five years without any claim being made for the higher rent, the consent of the landlord to the devise was assumed. In

(1) [1903] 1 I. R. 92.

(2) 2 H. & N. 615.

(3) 1902] 1 K. B. 690.

(4) 1 I. C. L. R. 311.

(5) 1 I. R. 5 C. L. 418.

(6) 1 I. R. 8 Eq. 231.

Appeal. *Dawson v. McGroggan* (1) a lost grant was presumed of a right to
 1904. cut turf from a user of over sixty years.

In re
 BOMFORD'S
 ESTATE.

LORD ASHBOURNE, C. :—

May 10.

This is an appeal from Ross, J., involving an interesting question, which arises on a set of facts easy to understand after the very clear arguments of Mr. Jellett and Mr. Walsh. So far back as 1703 the Commissioners of Forfeited Estates made a grant in fee of three townlands to a man named Dawson, subject to a quit rent of £12 13s. 0 $\frac{3}{4}$ d. Five years afterwards, on the 25th February, 1708, Francis Heaton, in whom the grantee's interest had become vested, made a fee-farm grant of Clonfad to Thomas Bomford, subject to a rent of £135 (Irish currency), over and above all taxes, except quit rent, which was to be paid by the grantor, and there was a covenant by Bomford to pay the rent, over and above taxes, except quit rent. That document, on which the question largely turns, is clear in its construction. The grantor, who is now represented by Hewson, was to be under the obligation to pay quit rent. But it appears that for years the Bomfords, who represented the grantee's interest, had been paying the quit rent. No question was raised, so far as the present Mr. Bomford is concerned, till 1900, when—the property being then in the Land Judge's Court—he looked into his rights, and found that he had been paying quit rent for which, apparently, he was not liable, and that Hewson, who represented the person who, on the above covenant, ought to have paid it, got off scot free.

The matter was then investigated in the Land Judge's Court by Ross, J., who had before him the fee-farm grant of the 23rd February, 1708, and that notwithstanding there was a mass of evidence that for over 100 years the quit rent was paid, not by the grantor, but by the grantee. The arguments of Mr. Jellett and Mr. Walsh were that that was all a mistake: that the Bomfords mistook their rights under the deed; but now that they had ascertained their rights, Hewson, who represented the grantor, must pay the quit rent, and Bomford should be exonerated from liability. Hewson met that by saying: "This

is not a new case; it is an old case. I rely on the facts and the user for 125 years, and that user of non-payment by us, and payment by the Bomfords, must be traced to a legal origin, and there should be, if needed, a presumption of a lost grant."

Appeal.
1904.

In re
BOMFORD'S
ESTATE.

Lord
Ashbourne, C.

There was evidence that the payments had been so made since 1780. It is true that Dopping came in in 1839; but Bomford had been paying before that and also after that. But 1839 is remarkable also for another fact. A correspondence exists which shows that the Mr. Bomford of that day sought to make out the same case as is made to-day, and a case was apparently submitted to counsel, the contents of which were suggested by Bomford, for an opinion whether it was according to law or fairness that Bomford should pay. We have this correspondence, but we have not the opinion of counsel. We may assume it was against the Bomfords, for they went on paying the quit rent exactly the same as before; and it would be a strong thing now to set aside the transactions of the parties, and to hold that people who paid this £12 a year for all these years were acting in error all along.

Mr. Jellett then said that the Bomfords were thrown off their guard, because the Bomfords had a sub-tenant, named Tyrrell, who held the lands from them at a rent of £218 5s. 6d. Tyrrell paid Heaton on behalf of Bomford £135, and he was entitled to credit for £80, these two sums making together £215, and that left £3 5s. 6d. to be paid by Tyrrell to Bomford, and that therefore Bomford forgot to deduct his quit rent from Heaton, as he was not actually paying him money. That might be all very well except for the transaction of 1839. There the question was raised by Bomford that the payment of quit rent was made in error, and against the obvious construction of the document. That contention was not followed up, and after 1839 the payments went on the same as before.

In my opinion, the view of Ross, J., is correct, and it is fair and just that what has happened must be traced to a legal origin, and the necessary presumptions made.

Appeal.
1904.

In re
BOMFORD'S
ESTATE.

FITZGIBBON, L.J. :—

As I understand the evidence, one quit rent of £12 13s. 0 $\frac{3}{4}$ d., payable out of three townlands, was created in 1703. In 1708 Heaton granted one townland, Clonfad, to a Bomford, Heaton covenanting to pay the quit rent in respect of Clonfad. That was followed, in 1710, by a similar transaction, when Heaton granted a second townland, Rattin, to Bomford. Heaton, therefore, was *prima facie* bound, and he intended, to pay the quit rent in respect of Clonfad and Rattin, from 1710. There is no further evidence until 1780—seventy years without any evidence.

But in and after 1780 the quit rent for Clonfad and Rattin was paid by Stephen Bomford, and it has been paid by Bomfords, his successors in title, ever since.

The only quit rent that, in or after 1780, is proved not to have been paid by the Bomfords is the part payable in respect of Ballyoughter, the third townland. One-half of this was paid in 1780 by a tenant not named; but there is no evidence that it was ever paid again until 1791, when a Bomford paid it for one year, to Michaelmas, 1791, and he continued to pay it until 1800.

Therefore, the evidence from 1780 down is that, as regards Clonfad and Rattin, Bomford paid the quit rent; and that, as regards Ballyoughter, no one except Bomford paid it, except that an unnamed tenant paid one-half of it for part of the time between 1780 and 1791. Having regard to the more modern payments, it is impossible to say that there is not abundant evidence to raise the presumption of a lost deed, making the Bomfords liable, when the evidence of payment by them goes back to 1780 at least, and their liability to pay was challenged in 1839 in the letters which are proved. From these letters it appears that the Bomford of that date demanded from Hewson, who then represented Heaton, payment of the arrears of quit rent. But Hewson did not pay, and the Bomfords have continued paying ever since; and the appellant has to explain why, for over sixty years, no one except himself or his predecessors in title has paid the quit rent, notwithstanding the fact that the question of liability was raised in 1839. In the absence of any other explanation, the law raises the presumption of a lost instrument to account for the course of dealing which began in 1780, and has been regular and unbroken, and

similar as to the whole quit rent, for sixty years after the ineffectual challenge of the liability in 1839.

Appeal.
1904.

In my opinion, the decision of Ross, J., is right.

In re
BOMFORD'S
ESTATE.

WALKER, L.J. :—

I concur. Mr. Jellett said that where there were clear words in a deed creating rights, as we have here in the deed of 1708, that deed cannot afterwards be varied by a presumption of a lost grant. If that were the law, this presumption could never arise. In every case the presumption is of a second deed altering the rights given by the original instrument. Here the facts and action of the parties cannot be reconciled with the covenant in the old deed, and there must have been something to make the change.

It has been said that the Bomford estate was put in settlement in 1809, and has been in strict settlement ever since. But the practice proved originated before 1809, and then, when the property was settled, the tenant for life took it as he found it. Then the question was raised specifically in 1839, and the claim was abandoned, and the Bomfords have paid ever since.

In my opinion, the decision of Ross, J., is right.

HOLMES, L.J. :—

I assume that both Heaton and Bomford knew the contents and effect of the deed of 1708, and that Heaton was liable thereunder to pay the quit rent. I do not know what occurred for some time after the execution of this instrument; but I do know that from 1780 Bomford, who had a covenant indemnifying him against quit rent, has continued to pay the entire quit rent out of Clonfad. What is the natural inference from that? How is this payment to be accounted for? It must be that, in consideration of some pecuniary or other benefit arising after 1708 and before 1780, Bomford undertook to pay the quit rent; and when this has been acted on now for 120 years, it would be extraordinary that we should say now that it had not a legal origin.

Solicitors having carriage : *Moore, Keily, & Lloyd.*

Solicitors for Major Hewson : *Wm. Fry & Son.*

Barton, J.
1904.

BALFE v. HALPENNY.

July 15, 30.

(1904. No. 279.)

Will—Gift of residue to executors—Implied trust for next-of-kin—Secret trust—Parol evidence—Admissibility.

A testator by his will bequeathed to his executors legacies for their trouble in administering his estate, and disposed of the residue as follows:—"I bequeath all the residue of my property of every kind to my executors, to apply the same as they shall think fit, and I appoint as my executors A and B." The testator's next-of-kin were his brother T. and the ten children of his late brother C. After the execution of the will one of the executors asked the testator how he would like the residue spent. The testator replied that he would like the six younger children of his late brother C. to get it, and that he did not wish the elder children of C. to get any, and that he would not like his brother T. to get a penny.

The six younger children of C claimed that the above conversation created a secret trust of the residue in their favour, to the exclusion of the rest of the next-of-kin:—

Held, that, upon the face of the will, the executors did not take beneficially, but upon an implied trust for the next-of-kin; that such a trust could not be varied by a conversation between the testator and one of the executors after the execution of the will, and that the doctrine of secret trust had no application to the facts of the case.

TRIAL OF ACTION.

By his will dated the 3rd February, 1902, Henry Balfe, of Bigstown, Ardee, in the county of Meath, after sundry other bequests, and after bequeathing £10 each to his executors for their trouble in administering his estate, disposed of the residue of his property in the following terms: "I bequeath all the residue of my property of every kind to my executors to apply same to such purposes as they shall think fit, and I appoint as my executors John Halpenny, of Batestown, and Thomas Haslin, of Piercetown."

The testator died on the 10th February, 1903.

At the time the will was executed one of the executors was present and heard it read. While returning home with the testa or

this executor asked testator how he would like the remainder of his property spent, and the testator said that he wished the six younger children of his brother Columbus to get it; that he did not wish the elder children to get any of it, and that he would not like his brother Thomas to get a penny.

Barton, J.
1904.
BALFE
v.
HALPENNY.

The above conversation was not communicated to the other executor until after the death of the testator.

The testator's next-of-kin were his brother Thomas Balfe, sen., and the ten children of his deceased brother Columbus Balfe.

The plaintiffs were the six younger children of Columbus Balfe, and, being infants, sued by their mother Elizabeth Balfe.

The defendants were the executors, the four elder children of Columbus Balfe, and Thomas Balfe, senior.

At the trial the plaintiffs contended that evidence of the above conversation was admissible, as establishing a secret trust of the residue in their favour.

Herbert Wilson, K.C., and *Daniel Kehoe*, for the plaintiffs:—

The will on the face of it discloses a trust, and that being so, evidence is admissible to prove what the trust was. It is immaterial whether the trust was communicated to the executors before or after the date of execution. The case in all its features clearly falls within *Riordan v. Banon* (1), and the law as there laid down by the Vice-Chancellor. *Riordan v. Banon* (1) was approved of in *In re Fleetwood* (2) and it is also referred to in *Williams on Executors*, 9th edition, p. 1351.

O'Shaughnessy, K.C., *Jelletts, K.C.*, and *Dickie*, for the defendant Thomas Balfe, senior:—

Evidence of a secret trust is clearly inadmissible in a case like the present. In the first place, the trust was not communicated to the executors prior to, or at the execution of, the will, but only communicated to one after the execution of the will and prior to the death of the testator, and to the other after the death. The trust is, therefore, invalid: *In re Boyes* (3). The legacies given to the executors for their trouble show that they were to hold the residue in trust; the words "to such purposes as they shall think

(1) 1 I. R. 10 Eq. 469. (2) 15 Ch. D. 594. (3) 26 Ch. D. 531.

Barton, J. fit" are plainly void for uncertainty, and, therefore, the law implies that the executors hold in trust for the next-of-kin. *Fenton v. Nevin* (1); *Scott v. Brownrigg* (2). The secret trust which it is sought to establish by evidence is inconsistent with the terms of the will, and on that ground alone is inoperative. Evidence cannot be offered which contradicts a will: *In re Huxtable* (3). In the present case no beneficial interest was given to the executors who took *virtute officii*. Qua executors, they cannot have a trust imposed on them. The only trust of which they are capable as executors is the trust created by the law for the next-of-kin: see judgment of Stirling, J., in *Re Lacy; Royal General Theatrical Fund Association v. Kydd* (4), at page 159.

Riordan v. Banon (5), so much relied on by the plaintiffs, has no application. Here there is a gift to executors in trust, and no beneficial interest is given. In *Riordan v. Banon* (5) the gift was to a legatee, and there was a communication of the trust to the legatee and acceptance of it by him prior to the execution of the will, and the trust was partially disclosed on the face of the will; but in the present case there was no communication prior to the execution of the will, and the alleged secret trust is inconsistent with its terms.

Geddis v. Semple (6) and *In re Steud* (7) were cases of fraud, and related to the distinction between the communication of a fraudulent purpose prior to the execution of the will to joint tenants and tenants in common. They have no distinct bearing on the present question. *McCormick v. Grogan* (8) was also a case of fraud.

This is not a case of secret trust; the effort is to apply the doctrine of secret trust, *i.e.* fraud, to a state of facts to which it has no application. The real effort is to contradict a will by parol.

Drumgoole and *Brunskill* represented the other defendants, and supported the contention put forward on behalf of the defendant Thomas Balfe, senior.

S. L. Brown, K.C., for the executors.

(1) 31 L. R. Ir. 478.

(2) 9 L. R. Ir. 246.

(3) [1902] 2 Ch. 793.

(4) [1899] 2 Ch. 149.

(5) I. R. 10 Eq. 469.

(6) [1903] 1 I. R. 73.

(7) [1900] 1 Ch. 237.

(8) L. R. 4 H. L. 82.

BARTON, J. :—

The six younger children of the late Columbus Balfe seek to have it declared that the executors of the will of their late uncle Henry Balfe hold the residue of his estate upon a secret trust for the plaintiffs, and to have that trust carried into execution.

The testator by his will, besides other dispositions of property, left to his two executors legacies of £10 each for their trouble in administering his estate, and disposed of the residue in the following words:—"I bequeath all the residue of my property of every kind to my executors to apply the same as they shall think fit, and I appoint as my executors John Halpenny, of Batestown, and Thomas Haslin, of Piercetown."

There is no dispute as to the effect of this residuary bequest. Upon that subject reference has been made to several cases, including *Fenton v. Nevin* (1). The residuary bequest, having regard to its terms and in view of the previous legacies to the executors for their trouble, was not a gift to them as individuals, but as executors; and they do not take it beneficially, but as trustees. The trust, however, is a trust of so vague, uncertain, and indefinite a character that effect cannot be given to it. The law steps in and implies a trust for the next-of-kin. It appears that at the death of the testator his next-of-kin consisted of eleven persons—namely, his brother Thomas, and the ten children of his deceased brother Columbus. Accordingly, upon the construction of the will, the executors hold the residue of the testator's estate upon an implied trust for those eleven persons according to their respective shares and interests.

The will was executed in a solicitor's office, and one of the executors was present and heard it read. Nothing was communicated to him by the testator at or before the making of the will about any trust, but after the execution of the will the executor drove home with the testator on a car, and on the way home asked him how he would like the remainder of his property spent? In answer to this question the testator said in effect that he wished the six younger children of his brother Columbus to get it; that he did not wish the elder children to

Barton, J.
1904.

BALFE
v.
HALPENNY.
July 30.

Barton, J. get any of it; and that he would not like his brother Thomas to touch a penny of it. On the same evening the executor had another conversation with the testator to the same effect. The testator, who died about twelve months afterwards, did not refer to the subject again, and made no communication upon the subject to the other executor. It is right to say that these executors have acted with entire honesty and *bona fides* in the matter. Their attitude is that they are willing to carry out the wishes of the testator as communicated to one of them. But they can only do so if the communication made by the testator constituted a binding trust as against the next-of-kin.

1904.
BALFE
v.
HALPENNY.

The plaintiffs' claim for the enforcement of this alleged secret trust is, in my opinion, unsustainable. The testator had executed a will, bequeathing his residuary estate to his executors, upon a trust so indefinite as to have the effect of a trust by implication of law for the next-of-kin. How could the testator modify, by a subsequent conversation with an executor, the effect of that implied trust? What right had the executor to agree with the testator to hold the residue upon trust for some of the next-of-kin to the exclusion of others? Would not the proper and legal way of carrying out such a purpose have been to make a fresh will, or a codicil, to that effect, duly executed according to the statute? The plaintiffs' claim seems to me to represent an attempt on their part to set up a species of oral or nuncupative codicil varying the legal effect of an implied trust.

Four lines of authority were referred to in the course of the discussion of this case. I think that Mr. O'Shaughnessy, from whose argument I derived much assistance, was justified in contending that none of them govern the present case. In the first place, the doctrine in accordance with which a Court of Equity fastens a "secret trust" upon the conscience of a beneficial legatee on the ground of personal fraud and inducement—as expounded by Lords Hatherley and Westbury in *M'Cormick v. Grogan* (1), and as exemplified by cases like *Moss v. Cooper* (2)—has no application to the facts of the present case. Wherever it can be shown that a gift was originally made, or, having been made, was retained in the will unrevoked, upon the faith of a promise by a

(1) L. R. 4 H. L. 82.

(2) 1 J. & H. 352.

legatee to carry out a secret trust, that trust will be enforced upon the ground of personal obligation and personal fraud; and the obligation is equally binding and enforceable whether the trust was communicated before or after the execution of the will. But in this case the person to whom the alleged trust was communicated was, upon the face of the will, not a beneficial legatee; and the persons beneficially entitled were neither expressly nor impliedly parties to any promise or inducement, and did not before or after the execution of the will know of or accept any trust. Secondly, cases in which a trust is referred to in the will as having been agreed upon with or communicated to the legatee, and in which the question arises whether parol evidence is admissible to ascertain what was the trust so agreed upon or communicated, are wholly inapplicable to this case, in which there is no such reference in the will, and no evidence of any such antecedent agreement or communication. Thirdly, cases like *Riordan v. Banon* (1)—which have not always been accepted without question—are distinguishable from the present case. The terms of this bequest are not consistent with the trust which the plaintiffs seek to set up. Besides, in *Riordan v. Banon* (1) the communication was made before the execution of the will. Fourthly and lastly, the present case does not come under the rule allowing parol evidence of intention to be given for the purpose of rebutting a resulting trust which some principle of equity raises against the apparent or *prima facie* intention of the will. This evidence is offered not to rebut but to vary an implied trust, and to contradict rather than to support the intention of the testator as expressed in the will.

Other difficulties in plaintiffs' way have been suggested in argument. For example, there is the question as to the effect of a secret trust communicated to one of two trustees, and not communicated to or accepted by the other. It is, however, unnecessary, in the view which I take of the case, to discuss these points. For the reasons which I have given I am of opinion that plaintiffs' claim cannot be sustained.

Solicitor for the plaintiffs: *Clark*.

Solicitors for the defendants: *M'Iver, Dickie, Potterton*.

J. MAC M.

Barton, J.
1904.

BALFE
v.
HALPENNY.

Barton, J.

1904.

Oct. 31.

IN RE IEVER'S SETTLEMENTS.

(1904. No. 795.)

Settled land—Trust for sale—Tenant for life—Sale to tenants—Leave of Court—Bonus—Irish Land Act, 1903, s. 48 (3 Edw. 7, c. 37)—Irish Land Act, 1904, s. 3 (4 Edw. 7, c. 34)—Settled Land Act, 1882, s. 63 (45 & 46 Vict. c. 38)—Settled Land Act, 1884, s. 7 (47 & 48 Vict. c. 18).

Where a person who is, under sect. 63 of the Settled Land Act, 1882, to be deemed tenant for life, has entered into agreements with the tenants to sell to them under the provisions of the Irish Land Acts, 1903, 1904, and applies to the Court, under sect. 7 (ii) of the Settled Land Act, 1884, for leave to sell, if the proposed sale is otherwise proper and advantageous to all parties, the Court will not deprive the tenant for life of his power to sell merely because the bonus payable under sect. 48 of the Irish Land Act, 1903, will be paid to him as his absolute property, under sect. 3 of the Irish Land Act, 1904.

By an indenture of settlement, dated 31st January, 1899, being a settlement made on the marriage of James Butler Ievers and Ernesta Carlotta Nina Whitla, the said James Butler Ievers conveyed to trustees therein named certain lands and premises therein described to the trustees in fee-simple upon trust after the solemnization of the marriage to sell same, but during the life of the said James Butler Ievers and Ernesta Carlotta Nina Whitla, or the life of the survivor of them, with their, his, or her consent in writing; and it was agreed that the trustees should stand possessed of the proceeds of the sale and of the rents and profits of the premises until sold upon the trusts declared concerning same in an indenture of even date therewith. And it was further agreed that the premises or any part thereof might be retained unsold, so long as the trustees should think proper, but should be deemed personal estate and devolve as such, and that until all the premises were sold the trustees might, with the consent of said James Butler Ievers and Ernesta Carlotta Nina Whitla, or the survivor of them, and after the death of both, at the discretion of the trustees, exercise with regard to the unsold part, all the powers of

leasing and making exchanges, and powers incidental conferred on a tenant for life by the Settled Land Acts. *Barton, J.*
1904.

By the indenture of even date above referred to, the trusts declared concerning the above premises were for the said James Butler Ievers for life, with remainder to the said Carlotta Nina Whitla for life, remainder to the children of the marriage upon the usual trusts, remainder in the event of failure of children, and upon the death of the said Carlotta Nina Whitla to the said James Butler Ievers, absolutely. *In re*
IEVER'S
SETTLEMENTS

There was no issue of the said marriage up to the date of the present proceeding.

The said James Butler Ievers entered into negotiations with the tenants on the above-mentioned premises for the purpose of a sale to them under the provisions of the Irish Land Acts, 1903, 1904, and agreements with the tenants were signed by him.

By a ruling on title, the examiner of the Irish Land Commission required the tenant for life to make an application to the Court for leave to sell as tenant for life under the provisions of section 63 of the Settled Land Act, 1882, and of section 7 of the Settled Land Act, 1884.

The present summons was taken out by the tenant for life for the purpose of obtaining the leave of the Court to exercise, with regard to the premises, the powers of a tenant for life conferred by section 63 of the Settled Land Act, 1882.

The trustees claimed that they should be appointed by the Court to sell, in which event the bonus payable under the Irish Land Act, 1903, section 48, would form part of the inheritance and would not go to the tenant for life: with this exception, they otherwise approved of the proposed sale.

O'Connor, K.C. (with him *Hugh Kennedy*), for the applicants:—

Under the Act of 1882, James Butler Ievers would be a tenant for life, and the trustees would be trustees within the meaning of the Act. Where, however, as here, lands are subject to a trust for sale, the tenant for life before exercising the power of sale must obtain the leave of the Court by virtue of the Settled Land Act, 1884, section 7. The trustees do not dispute the propriety of the sale, but only wish to deprive the tenant for life of the bonus

Barton, J. payable under the Land Law (Ireland) Act, 1903. The bonus, however, was expressly given to the tenant for life by the Irish Land Act, 1904, and it is the whole policy of the Act that it should go to him. In section 58 of the Settled Land Act, 1882, there is an enumeration of the persons who have the powers of tenants for life under the Act. The applicant clearly comes within the 9th class. All that section 7 of the Act of 1884 does is to place his powers as tenant for life in abeyance merely until the Court is satisfied that the proposed exercise of his powers is proper. It is in the interest of the tenant for life to see that the purchase-money is as large as possible, because the bonus is correspondingly increased. If the trustees were nominated by the Court to sell, they could not do so without the concurrence of the tenant for life. If that consent were refused, the sale would be indefinitely postponed, and the interests of the tenants would be prejudiced, which should be considered: see the judgment of Bowen, L.J., in *In re Marquis of Ailesbury's Settled Estates* (1), at page 544. The fact that the tenant for life will derive a benefit from the exercise of any power under the Settled Land Act is not in itself sufficient to prevent him from exercising the honest discretion required of him by section 53 of the Act: *Lord Stamford's Estate* (2). [*In re Bagot's Settlement* (3) was also cited.]

A. C. Meredith, for the trustees:—

The lands here are not in fact settled. They are assigned to the trustees in fee-simple in trust for sale; and by the last clause in the conveyance the trustees are given powers of leasing and exchange, which a tenant for life would have. They are thus the persons whom the parties themselves have chosen and designated as vendors. No doubt, by section 63 of the Act of 1882, the lands are deemed to be settled; and the applicant is deemed to be a tenant for life. But he is not in fact such, and cannot sell without the leave of the Court. Should the Court give him such leave? If he is a vendor, the percentage under section 48 of the Act of 1903, and section 3 of the Act of 1904, will go to him for his own use. If the trustees are vendors, the percentage will be added to the purchase-money. The Court ought not to give the applicant

(1) [1892] 1 Ch. 506. (2) 56 L. T. R. 484. (3) [1894] 1 Ch. 177.

leave to sell, when by so doing, it will injure the interest of the *cestuis que trustent*. A tenant for life selling under the Act of 1882 is trustee for all parties by virtue of section 53 of the Act of 1882. Here the applicant is considering his own interest, rather than that of the *cestuis que trustent*. The trustees are willing to sell, to act as vendors, and why should the Court prefer the applicant to the trustees? The Court should consider the interest of all the *cestuis que trustent*.

Barton, J.
1904.

In re
IVER'S
SETTLEMENTS

BARTON, J. :—

The applicant is a person who by section 63 of the Settled Land Act, 1882, is to "be deemed to be a tenant for life." He has negotiated a sale of the estate to the tenants under the provisions of the Irish Land Acts, 1903 and 1904; and he now applies under section 7 (ii.) of the Settled Land Act, 1884, for the leave of the Court, without which his powers of sale cannot be exercised. It is admitted by the trustees that the sale is an advantageous one for all parties concerned or entitled under the settlement. The sole objection is that the applicant will, it is said, upon carrying out the sale, be entitled to retain for his own use and benefit the percentage which is commonly called "the bonus." The trustees submit that I ought to refuse this application so as to enable them to become vendors.

I shall assume, for the purpose of the present application, that the applicant is a person who will, upon carrying out the sale, be entitled to retain the "bonus," and that he is influenced in selling by that circumstance. There would have been great force in such an objection before the passing of the Irish Land Act, 1904. But the Legislature, for the purpose of aiding the operation of these Land Acts, has seen fit, by section 3 (1) of the Act of 1904, to enact that where the vendor is a tenant for life, or a person possessing the powers of a tenant for life under the Settled Land Acts, the percentage shall, subject to certain exceptions, "be retained by him as his own proper money for his own use and benefit free and discharged from all claims upon the lands sold or the purchase-money thereof, and from any trust affecting the same." It is, in my opinion, no objection to an application of this kind that the applicant, if he is otherwise acting honestly and

Barton, J. for the advantage of all persons interested, may be influenced by an inducement which the Legislature has for reasons of public policy held out to him, or that he will gain a benefit which the Legislature
 1904.
In re
 IEVER'S
 SETTLEMENTS has expressed an intention of conferring upon him. In the absence of any other objection to the application, I see no sufficient ground for withholding the leave of the Court.

I do not find it necessary to discuss the other topics relied upon by Mr. O'Connor, *e.g.* that the effect of refusing this application might be to indefinitely postpone the sale, as the trustees have no power to sell without the consent in writing of the applicant and his wife. I only wish to add that I think the trustees were justified under the circumstances in submitting their view to the Court, the point being a novel one arising out of the provisions of the recent statute.

Solicitors for the applicants : *Blackall & Macnamara.*

Solicitors for the trustees : *Longfield, Kelly, & Armstrong.*

J. MAC M.

Meredith, J. IN THE MATTER OF THE ESTATE OF LEWIS GEORGE
 1904. NICHOLAS KEMMIS.

June 20.
 July 15. *Land Purchase Acts—Improprate tithe rentcharge—Redemption price—Principles on which to be assessed—Judicial Commissioner—Appeal from—Jurisdiction—Irish Land Act, 1903 (3 Edw. 7, c. 37), section 24, sub-sections 6 and 13.*
 Appeal.
 July 27, 28.

The Court of Appeal has jurisdiction, under sect. 24, sub-sects. 6 and 13, of the Irish Land Act of 1903, to hear an appeal from a Judicial Commissioner, as to the redemption price of impropriate tithe rentcharge. In ascertaining the price at which such tithe rentcharge ought to be redeemed, the Court ought to take into account, with other circumstances, (a) the value of ecclesiastical tithe rentcharges, (b) the value of money, and (c) the element of compulsory purchase.

THE lands of Ballycarroll, one of the estates for sale in this matter, situated in Queen's County, were subject to a revised impropriate tithe rentcharge of £14 9s. 5d., which was payable

to Lord Carew. The lands of Ballycarroll consisted of 777A. 3R. 5P. *Meredith, J.*
of arable land; the tithe rentcharge was amply secured, and had
been regularly paid. 1904.

In re
KEMMIS'S
ESTATE.

The owner applied to the Judicial Commissioner for an order that the tithe rentcharge be redeemed, and that the redemption price be fixed at £289 8s. 4d., being twenty years' purchase of the revised tithe. On behalf of Lord Carew, affidavits had been filed from auctioneers and valuers to prove that owing to the improvement in landed property the tithe rentcharge would, if sold in the open market, realise twenty-four or twenty-five years' purchase. The applications in this and in five other cases were disposed of together.

Chaytor, in support of the application.

Samuels, K.C., contra.

On the 15th July, Meredith, J., gave judgment, fixing the redemption price at twenty-two years' purchase.

MEREDITH, J. :—

In this case the tithe rentcharge, as varied, amounts to July 15.
£14 9s. 5d. per annum. It is charged on an area of 777A. 3R. 5P., the tenement valuation of which is £447 10s., and the rental of which was £438 13s. 10d. I fix the redemption price at the sum of £318 7s. 2d. In the case of Sir William H. Porter, the rentcharge is £10 12s. 5d. a year, the area is 561A. 2R. 25P., tenement valuation £312 15s., and the rental £292 6s. 6d. I fix the price at £233 13s. 2d. In *Thomas G. Wills Sandford's Estate* there are four tithe rentcharges, the first is £36 11s. 2d., as varied, on an area of 6098A. 3R. 4P., tenement valuation £2794, the rental is £2495 17s. 4d. I fix the price at £804 5s. 8d. There is a second charge of £3 3s. 8d. a year, charged on 439 acres, tenement valuation £243, rental £260 10s. I fix the price at £70 8s. The third charge is £15 19s. 4d., area 377A. 2R. 9P., tenement valuation £1182, rental £968 6s. 10d. I fix the redemption price at £351 5s. 4d. There is a small charge of £1 14s. a year charged on 261A. 1R. 31P., tenement valuation £110 5s., and rental £93 7s. 6d. I fix that at £37 8s.

Meredith, J. The curious and inquiring mind will ascertain from these 1904. — figures that the price has been fixed at twenty-two years' purchase. *In re* I have arrived at the figures after the most careful consideration *KEMMIS'S* and the most careful study of the decisions of myself, my colleague, *ESTATE.* Mr. Justice Ross, and of the Court of Appeal in *Bateman's Estate* (1), and in the recent case of *Leader's Estate* (2), and I am satisfied that the prices I have fixed are just and equitable, and in accordance with the law. I should perhaps say that if *Leader's Estate* (2) had not been decided, I should have been obliged, in accordance with my own decision in *Fitz Gerald's Estate* (3), to weigh and consider the evidence produced in *Kemmis's Estate* and in *Porter's Estate*, particularly, with great care, and I should have hesitated long before I applied in all its strictness the working rule referred to in *Fitz Gerald's Case* (3). I said at the close of my judgment in the last-mentioned case: "It only remains to add that in the present case no evidence was given on either side of any special circumstances.

"Mr. Jellett says he finds it difficult to determine what might or might not be considered a special circumstance. I can only say that I was willing in this as in every similar case to hear any evidence the parties on either side desired to adduce; and, for example, if it had been proved in this case that lay tithe rentcharges, similarly situated, had, since the Act of 1900, been sold in the market at a higher rate than twenty years' purchase, I should certainly have regarded such a sale, if *bonâ fide*, as a special circumstance to be weighed and considered." It is perhaps a curious and singular circumstance that notwithstanding that language, which I think to be reasonably clear, no attempt was made to give that special evidence until the present cases came before me. It now appears by the affidavit of Mr. Jones that tithe rentcharges have been sold since the Act of 1900, practically similarly situated, in this respect, that in the county of Cork the variation made under the Act of 1900 in tithe rentcharges was 25 per cent., while the variation made in *Kemmis's Case* in the Queen's County, according to Mr. Chaytor's book, was 23·7—very little difference between them. Six tithe rentcharges, the property of the Earl

(1) 4 New Ir. Jur. 137. (2) *Ante*, p. 368. (3) [1902] 1 I. R. 444.

of Donoughmore, were set up for sale by public auction, the particulars specified the provision of the Tithe Rentscharge Act of 1900, and the result was that three of the tithes sold for twenty-one years' purchase, one sold for twenty-three years' purchase, and, one, which was a very large one, £73 10s. 2d., was not sold at all. It is said that the sale referred to may be an isolated transaction; perhaps it may, but it furnishes the best, in fact it is the only actual, evidence of the market value or price in the market that has been adduced before me on the present occasion. I cannot disregard it, I cannot ignore it, and more especially can I not do so when, as I understand, Mr. Justice Ross, within the course of the last few days, in a case in which Lord Donoughmore himself was interested, on evidence with reference to these particular sales, fixed the price at twenty-two years' purchase. I don't depart from my decision with regard to the working rule; I don't retreat from anything that I have said: but upon a careful consideration of all the circumstances of this case and of the evidence, I hold that the price I have fixed is the correct one. In *Sir W. H. Porter's Case*, in addition to the fact that all these cases were discussed as a whole before me, the evidence as to the redemption of other tithes from time to time outside the Court by consent at twenty-two years' purchase was extremely strong, and I, perhaps, am not sorry to arrive at the conclusion at which I have arrived, having regard to the fact that in more than one case recently it has come before me, on ruling the final schedule or allocating the purchase-money, that there have been several lay tithe rentscharges payable out of an estate, some of which have been redeemed at twenty-two years' or twenty-two and a half years' purchase, by consent; while the working rule was employed with effect to fix the price of the others at twenty years' purchase. The *Wills Sandford Cases* I really cannot distinguish from the other two.

Meredith, J.
1904.

In re
KEMMIS'S
ESTATE.

W. C. S.

Appeal.
1904.

Lord Carew appealed (1).

In re
KEMMIS'S
ESTATE.

Samuels, K.C., and *Cherry, K.C.*, for the appellants :—

July 27, 28. A "superior interest," such as tithe rentcharge, cannot be of less value than the interest on which it is charged. Here the landlord has sold his estate at a larger number of years' purchase than the number allowed for the redemption of the tithe rentcharge. He is thus making an actual profit on the sale of the tithe rentcharge.

The universal practice of the Land Commission is to redeem ecclesiastical tithe rentcharge at twenty-two and a half years' purchase. This is in pursuance of a Treasury rule, and the consent of the Treasury is still necessary in the case of all ecclesiastical tithe rentcharges varied under the Act of 1900 (63 & 64 Vict. c. 58, s. 9). In such cases the extended power conferred on the Land Commission by section 37 of the Land Law Act, 1896, does not apply.

The Land Commission has not made sufficient allowance in respect of the compulsory nature of the redemption. It is very inconvenient for owners of tithe rentcharge to be paid off in small and uneven amounts. It is true there is no disturbance of possession, but there is another inconvenience equally great, viz.—the necessity to look out for a new investment of small sums from time to time.

An appeal lies from every order made by a Judicial Commissioner of the Land Commission as to the distribution of purchase-money under the Land Act of 1903, sect. 24, sub-sect. 13, even on a question of value : *Re Leader's Estate* (2).

Chaytor, for the respondent :—

No appeal lies. Under section 48 (3) of the Act of 1881, no appeal lay in matters arising under the Land Purchase Acts. Under section 22 of the Act of 1885, an appeal was given to any person aggrieved by a decision of any question of law. Section 41

(1) In the Court of Appeal, before LORD ASHBOURNE, C., PALLES, C.B., and FITZ GIBBON, L.J.

(2) *Ante*, p. 368.

of the Act of 1896 gave an appeal from one Commissioner to all three or to the legal Commissioner. It is conceded there was no appeal on a question of value prior to the Act of 1903. This is a decision under section 15 of the Act of 1887. Section 24, sub-sect. 13, of the Act of 1903 is limited to decisions under section 24 of that Act. This is not a decision under section 24, sub-sect. 6, of the Act of 1903, but under section 15 of the Act of 1887.

There is no analogy between the value of inappropriate tithe rent-charge and ecclesiastical tithe rentcharge: *Fitz Gerald's Estate* (1). Section 6 of the Irish Church Act, 1872, renders proofs in suits for recovery of ecclesiastical rentcharges simpler. It must be assumed the Judge had present to his mind the element of compulsory purchase by referring to *Leader's Estate* (2) in his judgment.

Cherry, K.C., in reply:—

The redemption of superior interests is a necessary part of the procedure for the distribution of the purchase-money, and therefore the order for redemption is made under section 24 of the Land Act. Express jurisdiction to make such orders is conferred by sub-sect. 10 of that section. In the case of sales of "estates," it is under this sub-sect. the order is now made, and not under sect. 15 of the Land Act, 1887. This Court has already recognised that an appeal lies from an order of the Land Judge fixing the redemption price of a superior interest: *Leader's Estate* (2). This jurisdiction is a statutory jurisdiction, the same in every respect as that of the Judicial Commissioner of the Land Commission: Land Law (Ir.) Act, 1896, s. 31, sub-sect. 4. The same right of appeal must exist from the Land Commission as from the Land Judge. Section 25, sub-sect. 2, of the Land Act, 1903, places vendors, incumbrancers, or owners of superior interests, in the same position as regards distribution of the purchase-money. If this appeal does not lie, then no appeal lies, even on a question of law, from the Judicial Commissioner, for section 41 of the Act of 1896 deals only with appeals to him, or a Court of which he is a member; and section 24, sub-sect. 12, abolishes all right of appeal from any decision of the Land Commission, "save as provided by this section."

Appeal.
1904.

In re
KEMMIS'S
ESTATE.

(1) [1902] 1 I. R. 444.

(2) *Ante*, p. 368.

Appeal.
1904.

In re
KEMMIS'S
ESTATE.

July 28.

LORD ASHBOURNE, C. :—

This is an interesting and, of course, an important case which has been very fully argued before us. We have had the benefit of hearing the argument yesterday; we have also had an opportunity of considering the case during the adjournment, and of hearing the further discussion to-day.

There are two questions in the case. 1. Whether the Court has jurisdiction to entertain the appeal; and 2. Assuming that it has jurisdiction, are there grounds for interfering with the decision of Meredith, J.?

It is obvious to anyone who has attended to the course of the argument that there was no keenness to discuss the question of jurisdiction. It did not rest with Mr. Cherry and Mr. Samuels to argue the question, but rather to answer the argument when it was raised. Mr. Chaytor, on the other hand, did not intervene with any preliminary objection, though it was competent for him to do so, but he relied on his main argument, and preferred going into the merits of the case; and it was only on the invitation of the Court that he presented his views on the question of jurisdiction. But once the question was mentioned, it had to be dealt with; and it was argued yesterday afternoon by Mr. Chaytor, and this morning by Mr. Cherry. We had many of the topics argued in this case discussed in *Leader's Estate* (1). That was an appeal from Ross, J., and consequently there is a slight distinction between that case and this, because the appellate sections as to the Land Judge are not the same as those with regard to the Judicial Commissioner. But in *Leader's Estate* (1), which was an appeal from Ross, J., on an analogous question, Holmes, L.J., was strong and clear in his opinion that there was an appeal. I said that I would not decide against the jurisdiction of this Court to hear the appeal, and that I would give my opinion on the merits. Fitz Gibbon, L.J., took very much the same view, and accordingly we sent the case back to Ross, J., with a statement of our opinion as a guide to him in dealing with the figures.

I wish to make a few remarks on this question of jurisdiction. As this case comes before us on appeal from Meredith, J., as Judicial Commissioner, it is different from *Leader's Estate* (1),

(1) *Ante*, p. 368.

which was an appeal from Ross, J.; but Mr. Samuels in opening his argument, for the purpose of making his position plain, contended that the appeal was right before the Court, and he stated that his contention was founded on section 24, sub-sect. 6, of the Act of 1903. Mr. Cherry's argument was an amplification of the opening argument of Mr. Samuels. He contended that it was clear that the appeal lay under section 24, sub-sects. 6 and 13, of the Land Act of 1903, and that there was a distinction between appeals under the fair rent sections and the purchase sections of the Land Law Acts. But he admitted that until section 24 of the Act of 1903 was passed, it would not have been competent to take this appeal. I am disposed to think that there is a great deal of weight and force in the argument of Mr. Cherry and Mr. Samuels on the question of jurisdiction. I am not prepared to hold without more argument that we have not jurisdiction to entertain the appeal; the balance of my mind is in favour of holding that we have such jurisdiction. On that assumption I see nothing to prevent me from expressing my views upon the merits of the case.

Appeal.
1904.
In re
KEMMIS'S
ESTATE.
Lord
Ashbourne, C.

It appears that there were several cases which came before Meredith, J., for the purpose of having the redemption prices of tithe rentcharges ascertained, and he delivered a clear and well-reasoned judgment, as he always does, fixing the redemption price in all these cases at the sums which he mentions. "The curious and inquiring mind," he says, "will ascertain from these figures that the price has been fixed at twenty-two years' purchase. I have arrived at the figures after the most careful consideration and the most careful study of the decisions of myself, my colleague, Mr. Justice Ross, and of the Court of Appeal in *Bateman's Estate* (1), and in the recent case of *Leader's Estate* (2), and I am satisfied that the prices I have fixed are just and equitable, and in accordance with the law."

Anyone who knows Meredith, J., must be satisfied that he would not give any decision that he did not consider would be just and equitable; but it is curious that the decision works out in each case at twenty-two years' purchase. It has been challenged by Mr. Cherry and Mr. Samuels on the ground that that is not

(1) 4 New Ir. Jur. 137.

(2) *Ante*, p. 368.

Appeal.
1904.

In re
KEMMIS'S
ESTATE.

Lord
Ashbourne, C.

enough, and that it is not just or equitable to fix the redemption price of tithe rentcharge at twenty-two years' purchase. It was not contended that the price is grossly inadequate: the appellants' counsel stated that if it had been a half year more—twenty-two and a half years' purchase—they would not have appealed, so that their case was put on a narrow difference. I myself am not disposed to encourage appeals of small amount upon questions of more or less, unless some question of principle has been omitted that ought to have been taken into account, or unless there is some measure of comparison that has not been observed. Unless some of these broader elements exist, I should not be disposed to favour such appeals. I do not suppose that Meredith, J., was desirous of having the matter further discussed, because he delivered a considered judgment.

It has, however, been pointed out that there are two elements, which may have been overlooked in fixing the redemption price at this figure—1. The difference between ecclesiastical and lay tithe; and 2, The fact that this was a compulsory purchase.

As to first of these elements, namely, that the difference between ecclesiastical and lay tithe may have been overlooked, I do not know how that is myself. Certainly Meredith, J., referred in his judgment to the decisions in *Leader's Estate* (1) and *Bateman's Estate* (2), which would lead one to think that he had the matter present to his mind, although he did not point out any difference between the measure of ecclesiastical tithe rentcharge, the redemption price of which he had in other cases measured at twenty-two and a half years' purchase, and lay tithe rentcharge which he measured at twenty-two. It is urged that there is not such a difference between the two, that one should be measured at twenty-two and a half years' purchase, and the other at twenty-two.

Then it has been suggested that Meredith, J., had not present to his mind the fact that this was a compulsory purchase. In order to distribute the purchase-money, there had to be payment of these claims, and thus the compulsory element came in. I am not much impressed with that argument, because the decision in *Leader's Estate* (1) is so recent, and in that case we pointed out

(1) *Ante*, p. 368.

(2) 4 New Ir. Jur. 137.

that there was the compulsory element. Now Meredith, J., in his judgment has stated that he arrived at the conclusion at which he did after careful consideration and study of the decisions, including *Leader's Estate* (1), and that being so, I think it hardly possible that a Judge so discriminating as Meredith, J., would not have had the element of compulsory purchase present to his mind in fixing the prices for redemption which he did. I think, however, that probably the wisest course for this Court to adopt will be to make an order to send the case back to Meredith, J., to deal with, having regard to these points as justice may require. I have not had an opportunity of applying myself to the exact frame of the order, but my colleagues have reduced it to writing, and it will meet the justice of the case.

Appeal.
1904.

In re
KEMMIS'S
ESTATE.

Lord
Ashbourne, C.

PALLES, C. B. :—

The order which we are about to make is an exercise of appellate jurisdiction, and, therefore, involves a *decision* that an appeal lies from the order before us. Whether it lies or not, is the first question.

I am of opinion that it does lie. The order is one which ascertains the value or price of certain tithe rentcharges, formerly charged upon lands which have been sold in this matter discharged therefrom.

A duty to make such an order is imposed on the Land Commission by section 24, sub-sect. 1, of the Land Act of 1903, and sub-sect. 13 of the same section enacts that, "An appeal shall lie to the Court of Appeal from any *decision under this section* given by a Judicial Commissioner, or to which he is a party"; and then follow words which show that decisions on questions of fact are within the sub-section, "and the decision of the Court of Appeal on any question other than one of law shall be final." The order appealed from here is one made by the Judicial Commissioner, and therefore, this first question is reduced to this, Is the order a decision under section 24? It is said, for the respondents, that it is not, but that it is an order under section 15, sub-sect. 2, of the Act of 1887 (2); and that, as it does not involve a question of law, it was not, before the Act of 1903, and is not now, appealable.

(1) *Ante*, p. 368.

(2) 50 & 51 Vict. c. 33.

Appeal.
1904.

In re
KEMMIS'S
ESTATE.

Palles, C.B.

The sub-section thus referred to enacts that "The Land Commission may, if they think it expedient, order the redemption of any tithe rentcharge . . . at a price to be fixed by the Land Commission." From an order under this provision, which did not involve a question of law, it is quite clear that before the Act of 1903 an appeal to this Court would not have lain, because section 48 of the Act of 1881 (1) excluded from the category of appealable orders those under its land purchase provisions, and those relating to questions of value; and the modification of this provision effected by section 22 of the Act of 1885 (2) related to decisions on questions of law only.

What then is the effect of the Act of 1903 upon the appealable quality of such an order as is before us?

This depends mainly on the construction of section 24; but before coming to its words, it may be right to say something as to the general character of that Act.

In the first place, then, it is to be observed that the category of sales within it is more extensive than that of the sales under any, or all, of the previous Land Purchase Acts. The subject-matter of these prior Acts were sales from landlords to tenants, and sales to the Land Commission itself for the purpose of re-selling to tenants. The Act of 1903 includes, *inter alia*, sales by landlords to persons other than tenants (section 2), and sales to the Land Commission of untenanted lands (section 8). The result of this is that sections such as section 15 of the Act of 1887, conferring special powers in respect of sales within that Act, would not apply to all the last-mentioned sales unless they were extended by the new legislation to the new subject-matter.

In the second place, there is throughout the Act (especially in sections 17, 56, 59, and 62) an indication of the strongest desire that sales under it shall be completed rapidly and cheaply. So far, indeed, has this desire been effectuated that under section 17 an intending vendor who gives *prima facie* evidence that he has power to sell, and who has for the six years immediately preceding been in receipt of the rents, may be dealt with, without any further investigation of his title, as if he were the owner for all purposes, save two, one of which is the distribution of the purchase-money. Then, the scheme of the Act is that,

(1) 44 & 45 Vict. c. 49.

(2) 48 & 49 Vict. c. 73.

subject to certain classes of charges specified in section 16, the conveyance to a purchaser shall pass to him a title in fee simple absolutely good, although the persons before the Court have not any title whatsoever.

Sections 1 to 23 carry out in substance this main intention of the Act—the sale of the land, and the substitution for it of the purchase-money.

At this stage the proceedings which are the subject-matter of section 24 come into play. That section commences by enacting that so soon as the estate is vested in the purchaser the Land Commission shall pay the purchase-money into bank, and make an order “attaching claims to the purchase-money”—an order which under the conjoint effect of sections 16 and 24 causes “the claims of all persons who are interested in the land, whether in respect of superior or intervening interests, or incumbrances, or otherwise, to attach to the purchase-money in like manner as immediately before the date of the order they attached to the land.”

Thus the distribution of the purchase-money necessarily involves, and consequently imposes on the Land Commission, a class of duties very different from those which the Act contemplated being performed by them during the previous stages of a proceeding under the Act. The last-mentioned duties are largely administrative; the former eminently judicial; involving the determination of every question which would have arisen as to the title to the land. In truth, it is at this stage that for the first time arises the necessity of a strict and rigorous examination of the title, and a judicial determination of all the questions thereon, which would have come before a Land Judge of the High Court on settling a schedule of incumbrances if the land had been sold by him. An order made by a Land Judge under such circumstances would have been appealable, and therefore it is not surprising that by sub-section 13 an appeal is given to this Court from “any decision under this section”; nor does it substantially detract from this plenary power of appeal that where the decision complained of is one to which the Judicial Commissioner is not a party, there must be a previous re-hearing before him under section 41 of the Act of 1896 (1). The latter provision does no more

Appeal.
1904.

In re
KEMMIS'S
ESTATE.

Palles, C.B.

Appeal.
1904.

In re
KEMMIS'S
ESTATE.
Palles, C.B.

than insure that the decision appealed from shall have been made judicially.

This plenary power of appeal from any decision under sect. 24 is in marked contrast with the express prohibition in sub-sect. 12 of the same section against appeals to this Court from any other decision of the Land Commission—a contrast undoubtedly founded on the difference in character between the two classes of decisions to which I have referred.

Now let me consider the words of the sub-section which confer the jurisdiction which has been exercised here. It is in these words—"The *Land Commission* shall, as soon as practicable, distribute the purchase-money to the persons entitled thereto whose claims upon that money *have been ascertained*, and for the purpose of such distribution *may ascertain* in the prescribed manner the amount or *value* of any such claim, and discharge, *redeem*, or satisfy the same out of the said money; and any charge or incumbrance may be paid off, notwithstanding any direction, proviso, or covenant to the contrary contained in any instrument."

The jurisdiction thus conferred is, as I believe, new in one respect. It is to be exercised in violation of contract. As to its extent, it is not confined to paying off charges which *have been ascertained*. It goes further: it includes the ascertainment of charges theretofore unascertained, and that not only where the thing unascertained is matter not alone of amount but of "*value*" as distinguished from amount, and where the ascertainment is of a charge of such a character that its extinguishment may be within that peculiar sort of discharge technically called "*redemption*."

It cannot be doubted that had it not been for section 15 of the Act of 1887, or if it had not been applied (as it has been by sub-sect. 10 of the section in question) to the extended subject-matter of this Act of 1903, the words of sub-sect. 6 would have been sufficient to confer jurisdiction to make the order now appealed from.

But the answer to the respondents' argument does not rest there. Had it done so, it would have left it open to the respondents to contend that the suggested construction of section 24 involved, in reference to a sale within the Act of 1887, the anomaly of there being two separate jurisdictions to make the order—one under the

Act of 1903 (section 24), under which it would be appealable ; and the other under that of 1887 (section 15), under which there could not be an appeal.

This would be an anomaly indeed, but sub-section 10 renders such a contention impossible. That sub-section (10) expressly confers on the Land Commission for the purpose in hand here—that of the distribution of purchase-money—“all the powers in that behalf conferred on them by the Land Purchase Acts in the case of sales from landlords to tenants.”

These powers include that conferred by section 15 of the Act of 1887 ; and its exercise, as here, for the distribution of purchase-money is a decision under sub-section 10 of section 24, and therefore “a decision under this section” within the meaning of sub-section 13, and appealable, although the question involved, instead of being one of law, is as to amount or value. Thus, whether we take the origin of the jurisdiction to be the one section or the other, the result is the same, the order is appealable. For myself, however, I desire to add that I hold that there are not two jurisdictions ; there is but one inseverable jurisdiction—that conferred by the various enactments construed together.

I desire to add a few words as to the merits. I do not know that I should be as slow as the Lord Chancellor has expressed himself to be to interfere with the discretion of the Judicial Commissioner, although there is no Judge whose administration of the law I more highly appreciate, or for whose judicial qualities I entertain greater respect. I see, with pleasure, that his sense of justice has successfully extricated himself, and the Court over which he so ably presides, from a strict rule or practice as to the redemption price of tithe rentcharge—laid down long previous to his appointment—a rule which I cannot think was either justified by the Act, or was right in itself. I am glad to support him in what he has done so well, and, perhaps, to encourage him to advance a little further in the same direction. Possibly there might be a difficulty in our interfering merely as to matters of detail ; but even as to those, I am unwilling to use words which may hereafter be relied on as fettering our discretion ; but, be this as it may, there can be no difficulty where questions of principle are involved. There are two principles applicable to the ascer-

Appeal.
1904.

In re
KEMMIS'S
ESTATE.

Palles, C.B.

Appeal.
1904.

In re
KEMMIS'S
ESTATE.

Palles, C.B.

tainment of this purchase-money, as to which I am not satisfied that sufficient weight has been given: (1) the principle of taking into consideration the value of the former ecclesiastical tithe rentcharge, now vested in the Land Commission; and (2) the principle applicable to the sale by reason of its being a compulsory one. As to the former, I am at present of opinion that the price of the ecclesiastical tithe rentcharge vested in the Land Commission is fixed by them at a price not less than twenty-two and a half years' purchase; and I am not prepared to hold that lay tithe rentcharge is less valuable than ecclesiastical tithe rentcharge. The argument that it is easier to recover ecclesiastical than lay tithe rentcharge is one to which I am not at present prepared to yield. I cannot hold that there is more difficulty in the recovery of the one than of the other; the fact that in one case you must have a copy of the applotment, and in the other may be satisfied with a certificate, ought not to affect the value of the property, and I am not satisfied that it does.

Secondly, I am not satisfied that sufficient weight was given to the fact that this sale was compulsory. We were told at the bar that the practice of the Land Commission is to hold that the claim to some addition to the ordinary price by reason of the purchase being compulsory ought not to be allowed, save where occupation is actually interfered with. I do not agree in that limitation. I think that by the compulsory change of property from tithe rentcharge into cash, involving the necessity of looking for a new investment of the purchase-money, and especially when these tithe rentcharges are bought up in small portions, a real and substantial injury is done to the vendor, which makes it impossible to say, as a matter of law—and I go no farther than that—that the principle of adding some small sum for the compulsory purchase is not applicable.

For these reasons I am of opinion that the matter should be referred back to Meredith, J., with the opinion of the Court to the effect which I have indicated.

FITZ GIBBON, L.J. :—

"Boni judicis est ampliare jurisdictionem": As the Lord Chancellor and the Lord Chief Baron hold that this Court has power to

review the valuation of superior interests by the Judicial Commissioner, it is not for me to question their decision.

In fixing twenty-two years purchase, Meredith, J., was making a substantial advance upon the twenty years previously fixed by what was called a "working rule" of the Land Commission; but no rule could—or can—lawfully supplant evidence, and the evidence given in this case not only warrants the advance to twenty-two years now given, but also shows that the "rule" was unjust.

Our jurisdiction, if it exists, carries with it the duty to satisfy ourselves of the adequacy of the valuation made, and of the soundness of its foundation in principle.

I am not satisfied on either point.

We have been referred to the reported opinion of Meredith, J., "that lay tithe rentcharges are *certainly* not more valuable than Land Commission tithes"(1). His reasons do not seem to me to be conclusive, nor do I agree that there is any special "difficulty in collecting them." Originally parts of the same property, belonging neither to landlord nor to tenant, but estates distinct from theirs, both lay and ecclesiastical tithes have their advantages and disadvantages as property, but the value and the price of each should be considered in estimating the value of the other; the principles and the results of the valuation, redemption, and sale, of ecclesiastical tithe, which have been made the subjects of legislation and of Treasury control, elucidate the valuation of lay tithe in many ways.

Again, I am not satisfied that Meredith, J., gave adequate consideration to the principle which justice demands, and which practice sanctions, of dealing liberally with a seller whose property is taken from him against his will, for the benefit—or supposed benefit—of other persons, or of the public. Meredith, J., does not mention this principle in his judgment, and the evidence and reasons which he mentions are sufficient to warrant the conclusion that he held twenty-two years purchase to be a fair market price, without any allowance for compulsory purchase. It is right to say that the "10 per cent. allowance" of professional valuers is open to all the objections to the "working rule" of the Land Commission, and I do not suggest that it ought to be adopted.

The principle is based on fairness; compelling the owner

Appeal.
1904.

In re
KEMMIS'S
ESTATE.

Fitz Gibbon,
L.J.

(1) *In re Lord Portarlington's Estate*, 33 Ir. L. T. R. 66.

Appeal.
1904.

In re
KEMMIS'S
ESTATE.

FitzGibbon,
L.J.

of a small, but regularly paid, income to take instead of it a broken capital sum of cash, hardly worth the trouble of investing, may make it fair to give him a larger proportionate allowance than that which would be sufficient where a larger sum was paid over. The relative amounts of the tithe and of the rental, and the number of years purchase which the landlord receives as the price of his interest, should also be taken into account in fixing the redemption price of the superior interest. It is not easy to see that a landlord voluntarily selling his estate should make a profit by compulsorily redeeming a superior interest at a number of years purchase less than that voluntarily paid to him as the price of his own interest.

In the judgment before us, Meredith, J., has put a considerable number of tithe rentcharges belonging to different owners, and variously circumstanced, into a Procrustean bed, somewhat larger, no doubt, than that of Mr. Commissioner M'Carthy, but equally inelastic. These rentcharges vary largely in amount, and in their proportion to the rentals; the prices payable to the landlords and other material circumstances also, probably vary. The fact that a uniform value is put upon them all, as well as the questions about ecclesiastical tithe and compulsory purchase, satisfy me that we ought to follow the same course which we took in *Leader's Estate* (1), viz., to remit the order under appeal to be reconsidered with due regard to all the circumstances, and, among them, to the value of ecclesiastical tithe rentcharges, and to the fact that the redemption is compulsory.

As in *Leader's Case* (1), the party having the carriage of the proceedings will have his costs in the matter, and the appellant's costs here and below will be added to the redemption price of his interest (2).

Solicitors for the appellant: *Dobbyn & M'Coy*.

Solicitors for the respondent: *Whitney & Moore*.

R. D. M.

(1) *Ante*, p. 368.

(2) On the case coming before Meredith, J., subsequently, he fixed the redemption price at £355, which was equivalent to 23·15 years' purchase. An appeal by the owner of the tithe rentcharge, on the ground that he was receiving a smaller number of years' purchase than the owner of the estate, was, on the 15th November, 1904, dismissed by the Court of Appeal.—[RWP.]

NEILL v. NEILL.

*Kenny, J.,
for M.R.*
1904.

*Will—Settled estates—Mortgage—Trustees—Salvage—Management—Powers
—Cestuis que trustent—Infants—Real estate—Jurisdiction.*

June 16, 23.

A sum of £125,000, portion of trust property held in trust for beneficiaries (the shares of some being in settlement and some of them being infants), was invested in a mortgage on a sheep farm in Australia. The mortgagor had purchased the farm for £450,000, and had expended considerable sums thereon. Owing to the great drought in Australia, the farm deteriorated, and the mortgagor got into difficulties, and became unable to pay interest on the mortgage. There was an attempted sale by the mortgagor, but there was no bidding, and the farm was unoccupied. The trustees of the trust property had taken proceedings in the Australian Court for foreclosure, and the decree would shortly be made absolute. The vacant farm was deteriorating; but rain had fallen, and there was promise of better seasons. The mortgaged property was subject to land tax and penalties for not keeping down rabbits:—

Held, that the Court had jurisdiction to, and would, under the circumstances of the case, allow the trustees to raise, by mortgage of the sheep farm itself, £30,000 for the expenses of working and managing the farm and paying outgoings.

ADJOURNED SUMMONS.

Application by Wm. Neill, of Benson, Wallingford, England, and Wm. Ferrar, of Cloona, Dunmurry, Co. Antrim, as trustees of the will of Henry James Neill, deceased, for the determination of the following questions:—1. Whether the plaintiffs, as trustees of the will of the said testator, will be justified in raising by way of mortgage for a term not exceeding seven years of their interest in the Burrabogie sheep station, situate in the Riverina district of New South Wales, and comprising 122,000 acres, or thereabouts, such sums of money as may from time to time be required up to, but not exceeding, the sum of £30,000, for all or any of the following purposes, and which the income (if any) arising from the said property and for the time being available may be insufficient to meet—(1) paying the land tax and keeping down the rabbits, and preserving in proper order the irrigation works, plant, and machinery, and the fencing, and maintaining buildings insured against fire;

M. R. (2) putting the said property into proper condition for use as a
 1904. sheep station by the erection of manager's house and stock yards
NEILL and wool sheds, and repairing the existing fences where defective ;
 v. (3) stocking the said property with a sufficient number of sheep, and
NEILL. working the same as a sheep station.

Mr. Neill died in the year 1891, domiciled in Ireland, and his will was proved in Ireland.

The material facts and circumstances of the case are stated in the judgment.

Jellett, K.C., and *G. H. Brett*, for the trustees of the will of Henry James Neill.

S. L. Brown, K.C., for the children of the testator.

Harrison, K.C., for the infant grandchildren.

The following authorities were referred to—*In re Willis* (1); *In re De Teissier's Settled Estates* (2); *In re Household* (3); *Conway v. Fenton* (4); *In re Hengler* (5); *In re Hurst* (6); *In re Hotchkys* (7); *Dent v. Dent* (8); *In re Jackson* (9); *In re Shaw's Trusts* (10); *Frith v. Cameron* (11); *In re New* (12); *Ferguson v. Ferguson* (13); *In re Hawker's Settled Estates* (14); *In re Legh's Settled Estate* (15); *In re Montagu* (16); Settled Land Act, 1882, section 25.

June 23.

KENNY, J.:—

An application such as the present one is so uncommon, and the circumstances of the case are so exceptional, that I have thought it well to give a written judgment. The summons is one by the trustees of the will of the late Mr. James Neill for the determination of the question, Whether they, as such trustees, will be justified in raising by way of mortgage of an Australian sheep farm, of which they are at present mortgagees, but of which they

(1) [1902] 1 Ch. 15.

(2) [1893] 1 Ch. 153.

(3) 27 Ch. D. 553.

(4) 40 Ch. D. 512.

(5) [1893] 1 Ch. 586.

(6) 29 L. R. Ir. 219.

(7) 32 Ch. D. 408.

(8) 30 Beav. 363.

(9) 21 Ch. D. 786.

(10) L. R. 12 Eq. 124.

(11) *Ibid.* 169.

(12) [1901] 2 Ch. 534, 543-545.

(13) 17 L. R. Ir. 552.

(14) 66 L. J., Ch. 341.

(15) [1902] 2 Ch. 274.

(16) [1897] 2 Ch. 8.

expect to be the absolute owners in the present year as the result of certain foreclosure proceedings, such a sum of money as will be sufficient to enable them to work and stock the farm with a view to its ultimate sale. The amount proposed to be raised is £30,000, and it is suggested that the security should be one for a term of seven years. The necessity for this very extreme step arises in this way. The late Mr. Henry James Neill died in the year 1891, having by his will vested all his property in trustees substantially in trust for his eleven children, all of whom are now represented before me. There were five sons and six daughters. According to the provisions of the will the sons took their shares absolutely while the daughters became entitled for life, with remainder to their issue. The will contained a trust for conversion with a power to postpone it in the discretion of the trustees. The testator's estate was value for about £400,000, and portion of it, to the extent of £100,000, was represented by a mortgage of the sheep farm in question. A further sum was, after the death of the testator, and pursuant to a power contained in the will, invested by the trustees upon the same security. The mortgagor was a Mr. Fitzwilliam Wentworth, who is believed to have purchased this sheep run for a sum of £450,000, and who is known to have effected extensive improvements on it. He was regarded as a wealthy and prosperous gentleman until recent times; but this great drought that has caused such deterioration in Australian land set in, and it is matter of common knowledge that its long continuance has caused wide-spread disaster amongst the colonists, and has brought financial ruin on many of those who were dependent on the success of sheep farming. Amongst others, Mr. Wentworth suffered, and, in 1903, was in financial difficulties and unable to meet the interest on the £125,000 mortgage. He put up the property for sale by auction, and there was not a single bid. The trustees then threatened foreclosure proceedings, and all that the mortgagor could apparently do was to undertake to facilitate them in obtaining a decree in the Australian Courts. Accordingly, proceedings with that object have been commenced, and it is expected that an absolute decree will be obtained in the month of August next. In the meantime the farm is unoccupied, notwithstanding all efforts made by the trustees for its tempo-

M. R.
1904.

NEILL
v.
NEILL.

Kenny, J.

M. R. rary management, and is rapidly deteriorating. Furthermore,
1904. the season of drought has apparently come to a close; fine
NEILL rains have fallen, and the grass, which had become short and
v. poor, is beginning to assume its normal appearance. But with
NEILL. a return of better seasons comes the danger, for a derelict farm
Kenny, J. like this, of bush or forest fires, and the certainty of sand
 storms filling up the tanks and dams, and rendering them quite
 useless. Furthermore, the property is subject to a heavy annual
 land tax, and the difficulty and expense of keeping down rabbits,
 with the attendant penalties for failure to do so, are no slight obli-
 gations. Under these circumstances the present application is made,
 and is supported by a remarkably strong body of evidence point-
 ing to the certainty of a most serious loss to the testator's estate
 unless some plan be adopted which may in all human probability
 save this property for the testator's legatees. It is not proposed to
 apply a penny of the trust fund to the carrying out of the trustees'
 scheme, save the property that is included in the mortgage, so that
 it is the very subject-matter that is hoped to be saved which is to
 be utilized for the very purpose of saving. The trustees find
 themselves confronted with two possible courses—the first, to
 abstain from working the farm, and to endeavour to let or sell it;
 the second, to go into possession, and manage it until a sale be
 possible. The first course, if it could be carried out, would be the
 most proper and desirable one; but I am satisfied on the evidence
 that no letting or sale can be effected while the property is situated
 as it is. Mr. Wentworth has tried to sell, but without success; and
 he submits to foreclosure of an estate that is stated to have cost
 him £450,000. It is necessary in the foreclosure proceedings that
 an absolute order should be preceded by an attempt to sell; and a
 telegram has been received within the last four days that no bid is
 expected at this forthcoming sale. In the meantime, the land, con-
 sisting of 122,000 acres, covering an area of about twenty miles by
 ten, will be derelict, and the great risk will be incurred of the trustees'
 estate being wholly lost. If, then, a letting or sale be out of the
 question at present, should, and can, the trustees be authorized to
 manage the estate, and raise money for the purpose? The idea has
 the merit that it suggests the possibility, if not the probability, of
 saving the property. If the latter could be otherwise saved or

realized, I would not hear of the present proposition. But it is the only method of salvation known to those experienced gentlemen who have made affidavits in the case. It may fail. Notwithstanding the break up of the late season of drought, the latter may—contrary to anticipation—be followed by another of the same character; and the proposed expenditure unquestionably runs the risk of being rendered valueless. But if it be, the property lost will be the same property that would be lost if no expedient were devised with the object of saving it. I say this, because I understand that it would be useless to try to effect a mortgage on it unless the mortgage-money was to be applied in the working of the run as a going concern. Consequently, the beneficiaries cannot be in a worse position.

I, therefore, think that it is in the interest of all parties that the proposed effort should be made, if this Court can see its way to authorize the contemplated mortgage. What is suggested is this—When the absolute order for foreclosure will be made by the Australian Court in the month of August next, the plaintiffs, the trustees, will be entitled to enter into possession freed from all right and equity of redemption in the mortgagor. They propose to then raise, by mortgage of the property, a sum sufficient to defray the expenses of works, outgoings, management, stocking, and interest for a period of two years. The evidence before me shows that no profit can be expected from the working of this sheep-run within that time. There will in that period, no doubt, be sales of wool, but the proceeds of such sales will not meet the costs of management, and there will be no surplus sheep to be disposed of before 1907. The details of the requirements of the property, so as to give it a chance of recovering itself and enabling it in the whole, or, at best, in a large part, to make good the £125,000 invested in it, have been presented to me in considerable fulness in the affidavits of Mr. Neill, of Mr. Kemp, the manager of the extensive firm of Dalgety & Co., the report of Mr. Campbell, who appears to be a gentleman of wide experience in such matters, and the affidavits of Messrs. Kingston, Watt, and Learmouth, who are well acquainted with this district of Australia. On these affidavits, I have come to the conclusion that if this proposal is to be carried out, the amount required ought to be raised by a single mortgage,

M. R.
1904.

NEILL
v.
NEILL.

Kenny, J.

M. R. once and for all; and I think it should not be for a less sum
1904. than £26,000, but not exceeding £30,000.

NEILL
v.
NEILL.
Kenny, J. As to the power of this Court to authorize the course proposed, I am satisfied that, while it will closely scrutinize such a proposal as the present, and will hesitate to adopt it, if other means of escaping the difficulties can be suggested, the Court has the power of sanctioning such a means of saving the property. If the trustees, without coming to this Court in the first instance, had done what they now propose to do, *bona fide*, and with the best intentions, and with a complete knowledge of the facts, supported by expert advice, and—after a loss—had come to the Court to declare them entitled to a charge on the particular property in respect of this expenditure, I think, on the authorities that have been cited by Mr. Jellett, they would have been entitled to a declaration that they were in the nature of salvagors. Indeed, I cannot on the facts before me imagine a stronger case for the exercise by the Court of its powers, if the latter are to be exercised in any case at all. If the trustees would have been entitled after expenditure to obtain the order I have mentioned, I see no reason why they should not now, for their protection, obtain an order in anticipation of their action. The case is an extreme case, not to be lightly drawn into a precedent; but I am so satisfied that this large property will be lost if the proposed effort to save it be not adopted, that I feel myself justified in authorizing this loan.

I am fortified in the conclusion I have come to by the weight of the interests that support the proposal. £125,000 is at stake. Eleven children of the testator—all, I am glad to say, alive—are interested in it. There are five sons and six daughters—the shares of the latter and of one of the sons being in settlement. The other sons, four in number, are entitled to their shares absolutely. They have already received £30,000 each on foot of their shares of the general estate; but notwithstanding that payment, the amounts coming to them out of the £125,000 would not be inconsiderable. The other son and all the daughters have life interests in the balance. They and their trustees and the four sons (to whom I have referred) all recommend the adoption of this scheme. I have to regard the position of the children of one of the sons and of three of the daughters (who are infants), and the possible issue of

three others of the daughters, and, giving the case the most anxious consideration, I have come to the conclusion that on their behalf the scheme should be adopted. Counsel on their behalf consider that it is for their interest that the order should be made. He has suggested some special terms to which the proposed mortgage should be subject, but these are matters I must leave to the trustees, in whom, having heard the oral examination of one of them, Mr. Neill, and having observed how thoroughly he and his co-trustee seem to appreciate the obligations cast upon them, I may say I have every confidence.

M. R.
1904.

NEILL
v.
NEILL.

Kenny, J.

Solicitors for the trustees of the will : *L'Estrange & Brett.*

Solicitor for the children of the testator : *H. Hurley.*

Solicitors for the grandchildren of the testator : *M'Clean & Son*
and *M'Kisack.*

R. W. L.

FINDLATER v. LOWE.

M. R.
1904.

Will—Mistake—Misdescription—Specific legacy—Deemed general legacy—
Extrinsic evidence.

April 21, 22.
May 3.

A testatrix lent £21,000 to A. F. & Co., a firm of which A. S. F. and W. F. were partners. The firm of A. F. & Co. ceased to exist in 1899, when a Limited Liability Company was formed, which took over its business. Testatrix was allotted debenture stock and shares in the new Company in respect of her debt. By will, in 1903, testatrix made the following bequest:—"To A. S. F. and W. F. I forgive the sum of £20,000 now owing to me jointly by them, or any member of the firm":—

Held, that A. S. F. and W. F. were entitled to be paid £20,000 out of the general assets of the testator.

Lindgren v. Lindgren (9 Beav. 358) and *Selwood v. Mildmay* (3 Ves. 306) followed.

THE material facts and circumstances of the case are stated in the judgment.

Gordon, K.C., A. F. Blood, K.C., and Thornhill, for the plaintiffs.

M. R. *Matheson, K.C., and A. C. Meredith, for Mrs. Susannah Lloyd,*
 1904. one of the residuary legatees.

FINDLATER

v.
LOWE. *G. F. Brunskill, for the executors and trustees of the will of*
 the testatrix.

May 3. THE MASTER OF THE ROLLS:—

The question in this case arises upon a codicil to the will of Mrs. Helen Corscaden, who was a lady of considerable means, and died on the 17th of March, 1903. She had been a Miss Findlater, niece of Alexander Findlater, the head (in his lifetime) of the well-known firm of Alexander Findlater & Co., and sister of John Findlater, afterwards head, or one of the heads, of that firm.

From Alexander Findlater she derived a sum of £21,000, which she lent to the firm in 1894, receiving in respect of it 5 per cent. per annum; and that sum was in law a debt due to her by the partners, which she could at any time have called upon them to pay. It was so for years; but at the date of her will it was not so; for the will bore date the 4th of June, 1901, and two codicils to it bore date 13th and 16th March, 1903, respectively, while on the 17th March, 1899, the firm of Alexander Findlater & Co. ceased to exist, and a Limited Liability Company was registered, which took over its business. What happened then is told in the affidavit of William Findlater. He says:—"I was a member of the firm of Alexander Findlater & Co., which was converted into a Limited Company on the 17th of March, 1899, under the style of Alexander Findlater & Co., Limited. In the year 1894 my aunt, Mrs. Corscaden, lent the old firm the sum of £21,000. At the time of the flotation of Alexander Findlater & Co., Limited, I went to London to see my aunt, to learn her views regarding this sum of £21,000. I called at her residence, and had a very pleasant interview. I fully explained the position of affairs to her, and asked her would she prefer her money back, or would she wish to place it with the Limited Company that was being formed. In the course of conversation she agreed to place it with the Limited Company, leaving the proportions of the classes of shares to me. This I arranged thus:—£12,000

debenture stock, £2000 preference shares, £7000 ordinary shares. In the course of this conversation she told me that in case it should at any time afterwards turn out the Company which was intended to be formed should come to grief, she had quite enough property, apart from this money, to live upon. At this interview she signed the necessary applications for the stock and shares above-mentioned, and I took the forms away with me. The said stock and shares were subsequently duly allotted to her."

M. R.
1904.
FINDLATER
v.
LOWE.

Mrs. Corscaden's will does not specifically deal with the shares or debentures in question, nor with any debt due by Alexander Findlater & Co.; but in the first codicil, dated 13th March, 1903, the following gift occurs:—"To Adam Seaton Findlater and William Findlater, I forgive the sum of £20,000 now owing to me jointly by them, or any member of the firm."

The firm is not named, but manifestly the old firm of Alexander Findlater & Co. is meant, though that firm had ceased to exist to her knowledge four years before. At the time of the formation of the Limited Liability Company in 1899, Mr. William Findlater went to London to see Mrs. Corscaden, and what occurred is detailed in his affidavit, to which I have referred. And he says (paragraph 4):—"I am aware that in the year 1902 she wrote a letter to my father complaining of the drop in the value of her general securities, and noticed she had not received a dividend," and so forth. "I went to see her in London, and she told me that she wrote the letter because there had been a fall in the amount of her annual income, and she wanted to show that she noticed these things. She also stated that if the stock and shares she held in the Limited Company went wrong, it would be her nephews who would eventually suffer." And he says—"The said Helen Corscaden died on the 17th of March, 1903, having previously made her will, and she named me as an executor to act along with Thomas Vacher Lowe." Probate was granted in 1903, and he says that—"According to the affidavit of assets which was then filed, it appeared that she left personal estate to the extent of £84,764 14s. 5d. There was no debt due by either Adam Seaton Findlater or myself to the said Helen Corscaden, she having accepted the said shares and stock in lieu of the said firm's indebtedness to her in the said sum of £21,000."

M. R.

1904.

FINDLATER

v.

LOWE.

At the date of her death Mrs. Corscaden was about seventy-three years of age.

Her knowledge of the circumstances connected with the creation of the Company, and her own position in reference to it, was, therefore, complete, though probably she forgot all about it when making the codicil in question. Mr. Lewin, a solicitor, and member of the firm which usually acted for her, drew her attention, when preparing the codicil, to the possibility of a private firm having become a public company, though he himself knew nothing of the facts in relation to Alexander Findlater & Co. Mr. Lewin's affidavit is evidence to the extent of showing what the knowledge of Mrs. Corscaden was in reference to her property, whether there had been a mistake on her part in reference to it, and what that mistake was, and how it arose, though I held that it could not be used in order to construe her testamentary dispositions.

The facts, therefore, are very simple. The lady had at her death £12,000 debentures, £2000 preference shares, and £7000 ordinary shares in Alexander Findlater & Co., Limited. These had been purchased by her with £21,000, a debt due to her by the partners in the firm then extinct. The question is, did these securities pass under the words — "To Adam Seaton Findlater and William Findlater I forgive the sum of £20,000 now owing to me jointly by them, or any member of the firm." The debt had been £21,000, not £20,000. There was no such debt due at the time by Adam Seaton Findlater and William Findlater, or anyone else. No debt could, therefore, be forgiven by her, though for some purposes the forgiveness of a debt is equivalent to a legacy of the amount, as, for instance, in reference to legacy duty, or abatement of legacies *inter se*, or lapse.

There is, of course, no question of ademption ; the debt, which was the subject-matter of the gift, having ceased to exist before, and not after, the codicil. Had the change of affairs occurred after the codicil was made, there could be no doubt that the doctrine of ademption would apply. But it is said the ambiguity is latent, and only brought to light by evidence of the facts, so that it may be shown by extrinsic evidence what it was to which the testatrix referred by the words in question. That she referred to the money

which had been a debt due to her by the Messrs. Findlater is clear, and it is equally clear that she did not intend by the words used to describe the debentures and shares into which it had been transmuted. The case must, therefore, logically be considered as if the debt when paid off had been invested in Consols, or in the purchase of land, or in any other way. It is not a case of misdescription. This is to be clearly borne in mind. The simple fact is that the testatrix had before the codicil been at one time entitled to a debt which, when she made the codicil, no longer existed, although from failure of memory she believed that it did, and bequeathed it specifically under that mistaken belief. What then is the law applicable to such a case?

Before considering that question, I may say that I construe this legacy as a gift to Adam Seaton Findlater and William Findlater of what was due by themselves, or their partners, and not as a gift to all the partners. "Forgive" is not a very good word to carry out this intention, but the intention is plain enough, and was to place the two named individuals in her position as regards the debt, and the meaning must be the same as if the word "give" had been employed. Mr. Theobald states the rule thus: "If a testator makes a specific bequest of something which he has not at the date of the will, evidence is admissible to show how the mistake arose, and the fact that the thing in question has been exchanged for something else before the date of the will, will not avoid the legacy. In such a case the legatees are entitled to a sum equal in value to the specific legacy at the testator's death"; and for that proposition Mr. Theobald cites *Selwood v. Mildmay* (1); *Lindgren v. Lindgren* (2); and *Goodlad v. Burnett* (3). Then he continues: "On the other hand, if the testator makes a specific gift of a thing he thinks he has, but never had, or of a thing which he intends to purchase, but does not, the gift is void." Now, if that be an accurate statement of the law, the legacy in this case has not failed; whether it is accurate or not depends upon the two cases quoted, of *Selwood v. Mildmay* (1) and *Lindgren v. Lindgren* (2), for *Goodlad v. Burnett* (3) was held to be a case of misdescription of certain Danish bonds—a distinction which, as I have said, it is vital to remember.

M. R.
1904.
FINDLATER
v.
LOWE.

(1) 3 Ves. 306.

(2) 9 Beav. 358.

(3) 1 K. & J. 341.

M. R.
1904.
FINDLATER
v.
LOWE.

In *Selwood v. Mildmay* (1), which was a decision of Sir Richard Pepper Arden, as Master of the Rolls, the facts were these: William Mildmay, by his will dated 26th January, 1796, gave to his wife Elizabeth Mildmay the interest and proceeds of £1250, "part of my stock in the 4 per cent. annuities of the Bank of England for and during the term of her natural life, together with such dividends as shall be due upon the said £1250 at the time of my decease." And after the decease of his wife he gave the said stock to several of his relations in certain shares and proportions, always calling it his 4 per cent. stock; and he disposed of the residue. There was a bill filed by some of the legatees, and an inquiry was directed—as was common in those days—and there was a finding by the Master that the testator had not at the time of making his will, nor from thence till the time of his death, any stock in the 4 per cent. Bank annuities.

The Master of the Rolls says:—"I do not think this case has been quite determined by any of the cases that have gone before it. I see in the case before Lord Kenyon, he considered that the testator by Bank stock meant South Sea stock; and that it was clear he meant to give that. But the principles of the cases determined, which are very necessary to be adopted by a Judge, who wishes to effectuate the intention, are so clear, that I have no difficulty in saying that a latent ambiguity arises from the testator's circumstances not being sufficient to meet the legacy he had given." Then he refers to the fact that the testator had made the provision for his wife, and that the Court would struggle in opposition to a construction which would deprive the wife of this provision through a mere mistake. And he says:—"There is no ambiguity upon the face of the will. Then the question is, whether the Court is not bound by every rule to admit evidence, where there is no ambiguity upon the will. Lord Thurlow's only doubt in *Fonnereau v. Poyntz* (2) was, whether parol evidence was admissible to ascertain whether the testatrix did not mean capital; but he had no doubt that he must know all the circumstances of her affairs, and, therefore, his first opinion was that though it did appear she could not mean to give so much

(1) 3 Ves. 306.

(2) 1 Bro. C. C. 472.

more than she could afford, yet he doubted whether he could give the words a meaning so different from their natural meaning. "In this case," he says, "the evidence is to prove, not that it is a mistake, for that is clear, but to show how that mistake arose; and when one reads what the case was, it would be unjust to refuse to rectify a mistake, so clearly and naturally accounted for. The testator had instructed a broker to sell out his 4 per cent. stock; and the identical money produced by that sale was invested in this Long Annuity. Nothing is now doubtful. It is clear the testator meant to give a legacy, but mistook the fund. He acted upon the idea that he had such stock. The distinction is this: if he had had the stock at the time, it would have been considered specific, and that he meant that identical stock; and any act of his destroying that subject would be a proof of *animus revocandi*; but if it is a denomination, not the identical *corpus*, in that case, if the thing itself cannot be found, and there is a mistake as to the subject, out of which it is to arise, that will be rectified." Then he says:—"Mr. Cooke puts the case of a testator giving his black horse when he only had a white one; perhaps it would be said he only mistook the colour; but suppose he had more white horses: I would rather put the case of a ring or a picture. The Court could not rectify that, if the subject could not be found; but here the Court will rectify it." The declaration he gave in that case was that "the plaintiffs with the several legatees of the £1250 stock are entitled to their legacies out of the testator's personal estate; and it being alleged that the personal estate is not sufficient, let the Master declare in what proportion they are to abate."

M. R.
1904.
FINDLATER
v.
LOWE.

I have read the judgment at some length, because some phrases used might lead one to suppose that the legatees took specific legacies of the substituted stock. But that is not so. And the decision and decree was that the original gift did not fail, but that the legacy was payable out of the general assets of the testator. *Dobson v. Waterman*, reported in a note to *Selwood v. Mildmay* (1), was a case of misdescription of the stock meant; and it was held that the legacy took effect out of a fund of 3 per cent.

(1) 3 Ves. at p. 307.

M. R.
1904.
FINDLATER
v.
LOWE.

South Sea annuities which the testator had, under a gift of 3 per cent. consolidated Bank annuities, which he had not, the intention being held to be established. Of course, as I have said, there is here no question of misdescription.

In *Lindgren v. Lindgren* (1) (a case before Lord Langdale) the facts were that the testatrix Susanna Stanley was in 1840 entitled to £1000 Bank 3 per cent. annuities, standing in her name in the books of the Governor and Company of the Bank of England. She had been in the habit of receiving the dividends herself; but in March, 1840, she went to the Bank and sold her stock for the sum of £903 15s., for which she received a cheque appearing to be drawn by James Wilson, on Williams, Deacon, & Co. She then called on the plaintiff, who had for a long time been intimately acquainted with her and her family, told him what she had done, and requested him to take charge of the money for which she had sold her stock and give her interest for it, to the amount of the dividends which she had previously received on the stock itself. The plaintiff consented to this, and she gave him the cheque for £903 15s., and he paid in the amount to credit of his private account with the Bank of England, and after that paid to the testatrix, by way of interest on the sum, £30 a year, being the amount she previously had received as dividends on her stock.

She made her will on 13th May, 1843, and thereby bequeathed as follows:—"I hereby give and bequeath unto Adolphus Lindgren" (the plaintiff) "£500 of the stock, 3 per cent. Consols now standing in my name in the books of the Bank of England." She then disposed of other portions of the stock, 3 per cent. Consols, up to the amount of £1000. She had no such stock as was described in her will, nor any other stock standing in her name in the books of the Bank, and the question arose as to what was the effect of her will purporting to give the stock, or what was meant to be given by the description of "stock" in the will. In giving judgment, the Master of the Rolls says:—"I cannot assume that the testatrix meant nothing by her bequest, or that she caused it to be inserted in her will in mere mockery, meaning only to delude and disappoint the objects of a pretended bounty. It ought rather

to be assumed that she had a rational meaning; and the real question is whether that meaning, or the true effect of her will, can be discovered by the addition of evidence consistently with the rules of the law. Upon the face of the will all is clear and free from ambiguity: whatever ambiguity there may be, it is latent. No difficulty occurs, till it appears, by evidence from without, that the testatrix had not, at the date of her will, the stock which she purported to bequeath." He then refers to *Selwood v. Mildmay* (1) at some length, and says: "It is very necessary to observe that in the case of *Selwood v. Mildmay* (1) the evidence was received only for the purpose stated by the Master of the Rolls in his judgment, and not, as it has been erroneously supposed, for the purpose of showing that the testator, when he used the erroneous description of 4 per cent. stock, meant to bequeath the Long annuities, which he had purchased with the produce of the 4 per cent. stock, and that the result of the cause was, not to substitute another specific subject, in the place of a specific legacy which the will purported to bequeath;—not to substitute the Long annuities which the testator had and did not purport to give, for the 4 per cent. Bank annuities which he had not and did purport to give. The absence of the fund purported to be given showing that a specific legacy was not intended, other evidence was admitted to show how the mistake arose; and this being clearly shown, it was held that the legatees were entitled to payment out of the general personal estate; and the decree declared that the legatees were entitled to be paid their legacies to the amount of the Bank 4 per cent. annuities purported to be given, and that such legacies were to be valued according to the market price the Bank 4 per cent. annuities bore on the day of the testator's death. This was the principle of the decree." He refers to *Miller v. Travers* (2), and *Hiscocks v. Hiscocks* (3).

In *Miller v. Travers* (2) the question was whether a testator who had no lands in the county of Limerick, though he purported to devise "his lands in Limerick," must be assumed to have intended to pass to the devisee a considerable estate which he held in the adjoining county of Clare. And it was held

M. R.
1904.
FINDLATER
v.
LOWE.

M. R.
1904.
FINDLATER
v.
LOWE.

that this was not so, and the Master of the Rolls says that this decision was not in his opinion inconsistent with *Selwood v. Mildmay* (1). He also quotes *Hiscocks v. Hiscocks* (2) which had been looked on as inconsistent with *Selwood v. Mildmay* (1), and he says: "The erroneous view of it which appears to have been taken is not noticed; and when it is remarked that evidence of instructions for the will was received, it is not observed that it was only admitted as part of the evidence to show how the mistake was made, i.e. for the purpose of showing that the erroneous description was copied from a former will. Under these circumstances I do not think that the case of *Selwood v. Mildmay* (1) is overruled by the cases of *Miller v. Travers* (3) and *Hiscocks v. Hiscocks* (2); and considering myself to be bound by the authority, I shall make a similar decree, declaring that the several legatees are entitled to their several legacies, to the amount of £1000 Bank 3 per cent. annuities; and that such legacies are to be valued according to the market price the 3 per cent. Bank annuities bore on the day of the testatrix's death."

Neither of these cases has been overruled, and they establish that if a testator has had at a time antecedent to the will a certain kind of stock or property, and has parted with it before the date of the will, and by his will purports to dispose of it in a way which if he had retained it would have been a specific legacy, it will be treated by the Court as a general legacy of equivalent amount payable out of the general personal estate.

Applying that principle to the present case, the only difficulty which presents itself is one of amount. If instead of a debt of £20,000, £20,000 consols had been given, it would have been easy to determine the amount of the legacy.

But it is said the legacy must fail, because you cannot say what is the value or what would have been the value at testatrix's death of £20,000 owed by the Findlaters. If necessary a reference might determine that; but I think no reference is necessary, because Mrs. Corscaden herself has determined the amount, which must be taken at par. The gift (or forgiveness) of £20,000 debt "due by Adam Seaton Findlater and William Findlater, or any member of

(1) 3 Ves. 306. (2) 5 M. & W. 363, 370. (3) 1 M. & S. 342; 8 Bing. 244.

the firm," when in fact £21,000 was due, is a gift, or forgiveness, of £20,000 of the debt; for those who owed £21,000, owed £20,000 and more.

M. R.
1904.

FINDLATER

v.

LOWE.

I think it clear there is in this codicil no gift of debentures or shares in Alexander Findlater & Co., Limited.

It was on this point that I expressed a clear opinion when the arguments closed. I am of opinion, however, that Adam Seaton Findlater and William Findlater are entitled to a general legacy of £20,000 out of the assets on the authority of the cases I have mentioned, and must decide accordingly. I am not sure that the more just way would not be to treat the securities of Alexander Findlater & Co., Limited, as really representing the legacy, but such is not the law. It is impossible that these securities could pass under a gift of "the sum of £20,000 now owing to me jointly by them, or any member of the firm."

Solicitors for the plaintiffs: *Findlater & Blood.*

Solicitors for Mrs. Lloyd: *Collis & Ward.*

Solicitors for the executors: *Thornton & Son.*

R. W. L.

Appeal.
1904.

IN RE DURROW BRICK AND TILE WORKS CO. (1).

June 2, 3.

Vendor and purchaser—Lien for unpaid purchase-money—Contract excluding lien—Waiver of lien.

By agreement, dated the 17th June, 1899, made between W. and M. and a Syndicate, it was agreed that W. and M. should sell to the Syndicate a brickfield for £13,000, of which £4000 was to be paid in cash, and £9000 in shares of a Company about to be formed. By agreement, dated the 23rd June, 1899, made between the Syndicate and the Company, the Syndicate agreed to sell to the Company the brickfield and premises for £25,000, of which £15,000 was to be paid in cash and £10,000 in shares. By subsequent agreements W. and M. agreed to take payment of the entire of their purchase-money in shares, and the Syndicate agreed to take from the Company £21,500 in shares, and £3500 in cash. The capital of the Company was to consist of 30,000 ordinary shares of £1 each, and 1000 £5 per cent. first mortgage debentures of £10 each. The prospectus stated—"The debentures are solely applicable as working capital, and for the erection of further plant and machinery, and are secured by a charge on the leaseholds, rights, and assets of the Company." It also stated that the Syndicate, who had agreed to defray all preliminary expenses, had fixed the price at £25,000, of which £15,000 was to be payable in cash, and the balance in shares, "leaving the entire debenture issue of £10,000 available for working capital and new machinery."

The brickfield and premises were assigned to the Company by W. and M. on the 30th August, 1899, though the deed was not executed by the Syndicate. The Company paid to the Syndicate £2676 on account of the £3500 (the portion of the purchase-money to be paid in cash), leaving a balance due of over £800. A considerable amount was subscribed for debentures, but the Company became abortive, and was wound up :—

Held, that the Syndicate was not entitled to a lien for unpaid purchase-money in priority to the debenture-holders.

APPEAL from the order of Barton, J., dated the 12th May, 1904, by which it was declared that, as between the debenture-holders and the Syndicate, the lien of the Syndicate upon the property of the Company was not postponed to the lien of the debenture-holders upon the said property.

(1) Before LORD ASHBOURNE, C., and FITZGIBBON, WALKER, and HOLMES, L.JJ.

On the 18th May, 1899, the Irish Industries Development Syndicate was established to promote, or help in promoting or floating, public Companies, with a capital of £5000, divided into 4000 ordinary shares of £1 each, and 100 vendors' shares of £10 each.

Appeal.
1904.

In re
DURROW
BRICK Co.

On the 10th June, 1899, the Durrow Brick and Tile Works Company was incorporated to acquire and take over from the Syndicate the Durrow Brick and Tile Works, situate at Durrow, in the Queen's County. The capital of the Company was to consist of 30,000 ordinary shares of £1 each, and 1000 £5 per cent. first mortgage debentures of £10 each. The prospectus stated—
“The debentures are solely applicable as working capital, and for the erection of further plant and machinery, and are secured by a charge on the leaseholds, rights, and assets of the Company, and a Trust Deed in favour of the trustees on behalf of debenture-holders will be duly executed.”

The prospectus also contained a clause to the following effect—

“The vendors, who have agreed to defray all the preliminary expenses, including underwriting of the Company, up to and including the first allotment of shares, have fixed the price, which includes their profit, to be paid for all the properties and works, including plant, machinery, and stock, and the goodwill of the business at £25,000, of which £15,000 is to be payable in cash, and the balance in shares, leaving the entire debenture issue of £10,000 available for working capital and new machinery, which, in the opinion of the Directors, is sufficient.”

The premises occupied by the Durrow Brick and Tile Company were held under a lease for ninety-nine years from Frances Mary White to R. H. Marsh.

By an agreement, dated the 17th June, 1899, made between Frances Mary White and R. H. Marsh, of the one part, and the Irish Industries Development Syndicate, of the other part, it was agreed that the Syndicate should have the option to purchase the Brick Works for £13,000, of which £4,000 was to be paid in cash, and £9,000 in shares of a Company about to be formed. On the 22nd June, 1899, the Syndicate, by a notice in writing, exercised the option, so that the agreement became a purchase. On the 23rd June, 1899, an agreement was entered into between the

Appeal.
1904.

In re
DURROW
BRICK CO.

Syndicate and the Durrow Brick and Tile Works Company for the sale of the Brick works by the Syndicate to the Company for the price of £25,000, of which £15,000 was to be paid in cash, and £10,000 in shares.

On the 17th July, 1899, a fresh agreement was entered into between the Syndicate and the Company, modifying the terms of the agreement of the 23rd June, by fixing the price of the property at £21,500 in shares and £3,500 in cash; and by a subsequent agreement, dated the 19th July, 1899, Frances M. White and R. H. Marsh undertook to forego their right to £4,000 (portion of the purchase-money) in cash, and agreed to take £4,000 in shares of the Company instead.

On the 30th August, 1899, the property of the Durrow Brick Works was assigned by Frances M. White and R. H. Marsh to the Company, but this deed was not executed by the Syndicate.

The debentures issued numbered 4,620, of which £2,590 were for actual cash received; £500 were issued to the Syndicate as part payment of the purchase-money; £1,500 were deposited with the bank as security for an over-draft; and £30 (*i.e.* 3 debentures) were issued as commission.

The Durrow Brick and Tile Company paid to the Syndicate on account of the £3,500 (the portion of the purchase-money to be paid in cash) the sum of £2,676 14s. 8d., leaving a balance due of £823 5s. 4d. On the 18th January, 1902, the Company went into liquidation, and on the 2nd July, 1902, an order was made referring it to Chambers to inquire as to what charges or incumbrances affected the undertaking, property, and assets of the Company in priority to the debenture-holders. The Syndicate claimed to be entitled to a lien for unpaid purchase-money in priority to the debenture-holders, and the Chief Clerk ruled in their favour. The matter then came before the Judge on a memorandum for the opinion of the Court upon certain questions which had arisen in the liquidation, but the only question dealt with on this appeal was No. 2 in the memorandum—"Is the ruling of the Chief Clerk correct, that the claim of the Syndicate for unpaid purchase-money, amounting to £823 5s. 4d., is payable in priority to the debenture-holders?" On the 12th May, 1904, Barton, J., decided that the Syndicate was entitled to priority, and the liquidator appealed.

O'Connor, K.C., and *W. G. Jefferson*, for the appellant :—

Appeal.
1904.

The Syndicate never had any estate or interest in the lands, and there was therefore nothing on which the lien could operate: they cannot have a specific charge on any part of the property. The contract of sale was such that it inferentially excluded lien: *Brentwood Brick Company* (1). But over and above all this, it would be inequitable to the debenture-holders to permit any lien or charge to have priority to them, when by the terms of the prospectus the debentures were to be a first charge on the property.

In re
DURROW
BRICK Co.

Matheson, K.C., and *A. C. Meredith*, for the Syndicate :—

The Syndicate had an interest in the lands, which would give them a lien, because the moment they exercised the option to purchase, they became equitable owners of the property, and that equitable estate of the Syndicate is still in them. When the property and works were conveyed to the Company, it was subject to payment of the purchase-money to the vendor, and after that come the debentures issued by the Company. The Company got the conveyance without paying the purchase-money, and the Syndicate have the rights of an ordinary vendor, which, even if there were no lien, they could enforce by specific performance.

Jonathan Pim, for the debenture-holders.

LORD ASHBOURNE, C. :—

June 3.

This is an appeal from an order of Barton, J., dated the 12th May, 1904, by which it was declared, "that as between the said debenture-holders and the said Syndicate the lien of the said Syndicate upon the property of the said Company has not been postponed to the lien of the said debenture-holders upon said property." The question for our decision is the abstract point contained in that order.

There is nothing particularly novel in the history of this Company, except that the figures are not so large as usual. The property was purchased originally by the Syndicate from the owners at the modest price, to start with, of £13,000. That

Appeal. went up to £25,000, when it was sold to the Company by the
 1904. Syndicate. Our Irish views on these matters are smaller than

In re those prevalent in England, where the capital of a Company
 DUBROW attains to much larger proportions. But this Company became
 BRICK Co. completely abortive, and it developed into the position of an under-

 Lord taking that never started to work.
 Ashbourne, C.

In deciding the question before us, I confine myself to the prospectus for which the Syndicate are directly and solely responsible, and on its provisions I base my judgment. It cannot be denied that for the issuing and wording of the prospectus the Syndicate are responsible. I shall not read it, as it has been read more than once already.

These Brick Works at Durrow, in the Queen's County, were turned into a Company with a share capital of £30,000, divided into 30,000 ordinary shares of £1 each, of which 15,000 were offered for subscription, together with 1000 £5 per cent. first mortgage debentures of £10 each. According to the prospectus—"The debentures are solely applicable as working capital, and for the erection of further plant and machinery, and are secured by a charge on the leaseholds, rights, and assets of the Company, and a trust deed in favour of the trustees on behalf of the debentureholders will be duly executed." I need not wade through the statements as to who are the directors, solicitors, and auditors; as to where were the offices, and who was the secretary; or refer to the report of the engineer who inspected these works. The only other passage I need refer to is the clause dealing with the application of the capital. "The vendors, who have agreed to defray all the preliminary expenses, including underwriting of the Company, up to and including the first allotment of shares, have fixed the price, which includes their profit, to be paid for all the properties and works, including plant, machinery, and stock, and the goodwill of the business, at £25,000, of which £15,000 is to be payable in cash, and the balance in shares, leaving the entire debenture issue of £10,000 available for working capital and new machinery, which, in the opinion of the Directors, is sufficient."

That is a perfectly straightforward statement, which tells its own story. The share capital was one thing, and the debenture capital was another. The share capital was to be

employed in purchasing the property, and the debenture capital was to be employed in supplying the working capital of the concern. Those who desired to become debenture-holders could do so, and in so investing their money, they were to be secured on the leaseholds, rights, and assets of the Company, and their money was to be employed as working capital.

Appeal.
1904.

In re
DURROW
BRICK Co.

Lord
Ashbourne, C.

The Company had vicissitudes of opinion as to the proportions in which the capital was to be supplied. The vendors at first thought that they would take more of the purchase-money in cash, and less in shares; then that agreement was modified, and the vendors agreed to take less in cash, and more in shares. What was the result? A considerable sum of money was subscribed for debentures by people who wanted to become debenture-holders—the exact amount we have not been told, but there was a class of persons who subscribed their money that they might acquire the *status* of debenture-holders. What is the position of the Syndicate who formed the idea of making this not very large undertaking into a Company? They ultimately fixed the price they wanted for the works at £3500 in cash, over and above 21,500 shares. Even that amount was not realized, but a sum of £2676 14s. 8d. only was paid in cash, and that left £823 5s. 4d. of the cash portion of the purchase-money unpaid. The Company became abortive, and is now in liquidation, and the Syndicate now claim that they are entitled to a lien for the unpaid balance of the purchase-money in priority to the debenture-holders—whether it is called a lien for unpaid purchase-money, or a charge on the assets of the Company, does not matter—they claim this priority.

Barton, J., arrived at the conclusion that the Syndicate were entitled to priority. I am entirely against him on that, and for the reasons of my judgment I confine myself to the prospectus, by the terms of which the Syndicate were to look for the amount of the purchase-money solely to the money subscribed for shares. On the prospectus, the position of the debenture-holders is clear and unqualified: their money was to form the working capital, and it was on the faith of this that they subscribed. If it was hinted on the face of the prospectus that anyone was to be before them, not one of them would have touched these debentures. It would be

Appeal.
1904.

In re
DURROW
BRICK CO.
Lord
Ashbourne, C.

impossible in any aspect of the case to hold that their claim should be postponed to the payment of the purchase-money.

That is the whole case. Among the authorities, the *Brentwood Case* (1) was referred to by Mr. O'Connor, and I agree with him that it is exactly in point here. That was a case of a Brick Company, in which the Company agreed to pay to the vendor £8000 as the purchase-money of a brickfield, of which £6000 was to be paid in cash, and £2000 in fully paid-up shares. But the assignment from the vendor to the Company provided that the £6000 was to be paid—not in cash—but that the vendor was to get 50 per cent. of all moneys received by the Company on the sale of shares, and a like sum of 50 per cent. upon all money by way of capital to be at any time borrowed by the Company, until the vendors received £6000. James, L.J., in giving judgment, said that a great deal of weight was to be attached to that distinction. If the Company was to be paid £6000 in cash, that was one thing; if the purchase-money was to be worked out some other way, that was entirely another thing. He says—"No doubt the vendor got a higher price by agreeing to accept payment in the way he did, and taking his chance of capital being subscribed, or capital being borrowed, to an amount sufficient to pay him." Every word of that judgment is applicable to the facts of the present case. Here the Syndicate were looking to the share capital of the Company for the payment of the purchase-money, and they were depending on the chance of the Company turning out a success. I think we require no authority for our decision of this case, as we have enough on the face of the prospectus upon which to decide it; but if we wanted an authority, we find it in the *Brentwood Case* (1). For these reasons, I am of opinion that the decision of Barton, J., cannot be sustained, and the appeal must be allowed with costs.

FITZ GIBBON, L.J. :—

The only question argued before us, and the only question which we have to decide on this appeal, is whether the Syndicate

has a lien for unpaid purchase-money against the debenture-holders. In our opinion, it has not. Our order will be—

Appeal.
1904.

In re
DURROW
BRICK Co.

Fitz Gibbon,
L.J.

“DISCHARGE the order of Barton, J., and in lieu thereof declare that the debenture-holders are entitled to have, and to be secured by, a charge on the leaseholds, rights, and assets, and on the undertaking of the Company, in priority to any charge, lien, claim, or demand of the Irish Industries Development Syndicate, and the parties not being prepared at present to discuss in this Court any other question arising on the memorandum in the order mentioned, remit the matter to the Judge of the Chancery Division to proceed as to justice may appertain.”

The ground upon which we hold that this order is the right of the debenture-holders is, that their money was advanced on the terms offered in the prospectus, which stated that “the debentures are solely applicable as working capital, and for the erection of further plant and machinery, and are secured by a charge on the leaseholds, rights, and assets of the Company.” When those terms were accepted and acted on, the transaction became a contract.

The list of subscribers was opened on July 7, and it was to close on July 11. Who made the offer to the public? We are satisfied that it was the offer of the Syndicate, as well as of the Company. The Syndicate was a party to the prospectus, and it invited the public to bring in money. That was the business of the Syndicate, as stated in its memorandum of association, paragraph 3 :—

“To promote, or assist in promoting, registering, or floating, public companies for any purpose, and to subscribe, or undertake to subscribe, and procure any subscriptions for, or deal in, shares in any Company that shall be so promoted, or is now in existence.”

Therefore, it was in fulfilment of one of the objects of association that the Syndicate asked the public to subscribe money on the terms of the prospectus which floated the Company.

There are only two paragraphs of the prospectus which deal with this matter. The Syndicate also asked for money for shares. We say nothing as to what was to become of that money; but the debentures were to be solely applicable as working capital, and for new plant and machinery; they were to be secured by a

<i>Appeal.</i> 1904. <i>In re</i> DURROW BRICK Co. Fitz Gibbon, L.J.	charge on the leaseholds, rights, and assets of the Company, and a trust deed to secure the debentures as a charge, was to be executed. The payment of the money was invited on a representation that it would be so secured; therefore, on paying it, each debenture-holder became <i>ipso facto</i> entitled, in equity, to a charge on the leaseholds, rights, and assets.
--	---

Mr. Matheson protested against the idea that they were secured, because the trust deed was not executed: it was not, and there was, therefore, no *legal* charge; but inasmuch as the public were asked to subscribe their money, and did so, on the terms that when given it was to be charged on the property, equity so charged it, and would not allow anyone—except, perhaps, a legal purchaser for value without notice, which the Syndicate certainly was not—to deny the charge, or to claim precedence over it.

Mr. Matheson is right in saying that the debentures are a charge on the property of the Company only. He says the leaseholds were not the property of the Company until they were conveyed to it. He is right in that, too; but a clause in the prospectus shows that, as against the Syndicate, the leaseholds were the property of the Company in equity before conveyance; for what is agreed to be done, or represented to have been done, must be treated as done.

“The vendors [*i.e.* the Syndicate] who have agreed to defray all the preliminary expenses, including underwriting of the Company, up to and including the first allotment of shares, have fixed the price, which includes their profit, to be paid for the properties and works, including plant, machinery, and stock and goodwill of the business, at £25,000, of which £15,000 is to be payable in cash, and the balance in shares, *leaving the entire debenture issue of £10,000 available for working capital and new machinery*, which, in the opinion of the Directors, is sufficient.”

The money for the debentures was, therefore, subscribed on the invitation of the Syndicate, on the representation that the entire of it would be applied for a specific purpose. Whatever money came from a debenture-holder to those who were responsible for that prospectus, the receivers were bound to see applied to what it was subscribed for; they could not apply it to any other purpose, and *a fortiori* they could not apply it to any purpose of

their own, or claim any lien upon it for themselves. If it has disappeared, it must be replaced by those who are responsible for the prospectus, and those persons include the Syndicate. The case against the Syndicate rests on contract, implied from representations acted upon, and on the rights conferred by the plain terms of the prospectus, as an offer made and accepted. Furthermore, the prospectus disclosed on its face the two agreements; and under them the rights of all the parties in the leasehold lands were equitable rights, or estates, equitably pledged to the debenture-holders as security for their money, by the very act of receiving it.

Appeal.
1904.

In re
DURROW
BRICK Co.

Fitz Gibbon,
L.J.

I want to be quite clear as to what is to happen next. The second question on the memorandum did not arise before Barton, J., when he decided the first question as he did; but if he had decided the first question the other way, it would have arisen before him. We have now reversed the decision of Barton, J.; and the second question, therefore, has now arisen. But we have the cross-notice of the Syndicate, and we know nothing of the evidence mentioned in the order, which has not been opened. We stopped Mr. O'Connor on the second question in the memorandum, until the first should be decided. If the parties were prepared to discuss the whole case now on that evidence, and to bring it to a final issue without further evidence, or without considering whether further evidence can be produced, we would hear them; but as they tell us that they are not ready, the case must go back to Barton, J.

WALKER, L.J.:—

I concur. I do not want to add anything. I decide the case on the terms of the prospectus, and I don't enter into the question of lien at all.

HOLMES, L.J.:—

If the vendors had been strangers to the Durrow Company, had not been engaged in promoting it, and were not responsible for its prospectus, I should yield to Mr. Matheson's arguments. But the Irish Industries Syndicate was incorporated for the purpose of promoting companies, and it called into existence the Durrow

Appeal.
1904.

In re
DURROW
BRICK Co.
Holmes, L.J.

Company, whose prospectus was its work. This document shows that an allotment of debentures was contemplated, the security for which was to be an immediate charge upon the undertaking, including the leaseholds which the Syndicate had contracted to sell to the Company. No doubt an applicant for a debenture might know that the purchase-money of the leaseholds was still to be paid, but he was also told that the Syndicate was looking for such payment from another source, and that his security was independent thereof. It is not a case of fraud or misrepresentation in the prospectus. It seems to me to be an honest document; but the Syndicate that issued it, and are bound by it, cannot now be permitted, contrary to what I regard as its true construction, to reduce the security offered to the debenture-holders by a preferential payment to themselves.

Solicitors for the official liquidator: *Dobbyn & M'Coy.*

Solicitors for the Irish Industries Development Syndicate:
Collis & Ward.

Solicitors for the trustees for the debenture-holders: *Molloy & Molloy.*

R. D. M.

M. R.
1904.

March 30.

JENNINGS v. HANNA.

(1904. No. 217.)

Will—Annuity—Gift to grandchildren during their lives—Implied gift to survivor.

A testator was possessed of a perpetual annuity of £33 4s. 8d. out of the lands of L. By his will the testator bequeathed to each of his grandchildren, M., F., and E., £11 1s. 7d. yearly during their lives, and directed that after the death of all his said grandchildren, the L. annuity of £33 4s. 6d. was to devolve upon his son W. The annual sum of £11 1s. 7d. was one-third of the L. annuity. M. and F. died, leaving E. and W. surviving:—

Held, that the annual sums of £11 1s. 7d. payable to M. and F. were not undisposed of after their deaths, and that E., the surviving grandchild, was entitled to them during her life.

M'Dermott v. Wallace (5 Beav. 142) followed. *Lill v. Lill* (23 Beav. 446) distinguished.

ORIGINATING SUMMONS.

This was an application on behalf of Francis Jennings, a lunatic so found, by Elizabeth Kellett, the committee of his estate, for the determination of the following questions, arising on the construction of the will of Francis Jennings deceased:—1. Whether upon the true construction of the said will, and in the events which happened, two annual sums of £11 1s. 7d., being two-thirds of a perpetual annuity of £33 4s. 8d., charged upon the lands of Lurgan, Corraheel, and Drung, in the county of Cavan, were undisposed of by the said will, and devolved upon the plaintiff as heir-at-law of the testator during the life of Elizabeth Jennings; 2. In the event of the Court holding that there was no intestacy, to determine to whom the said sums went during the life of Elizabeth Jennings.

The defendants to the summons were William Henry Hanna, the surviving executor of the will of Francis Jennings, William Jennings, and Elizabeth Jennings.

The provisions of the will and other facts of the case are sufficiently stated in the headnote and judgment.

Frederick Fleming, K.C. (T. J. Smith with him), for the heir-at-law:—

William Jennings is to get the Lurgan annuity after the death of all the grandchildren named. There is an intestacy during the life of Elizabeth as to the annuities given to Mary and Frances. They were not tenants in common of one annuity, therefore their representatives take nothing. A separate annuity was given to each child, so that Elizabeth does not take by survivorship. *Lill v. Lill* (1). In *M'Dermott v. Wallace* (2) the survivor was held entitled, but there was a gift of one annual sum to be equally divided during the lives of two persons. The gift over here, in the event of misconduct, does not affect the question. There is no general residuary clause capturing undisposed of property. There is no such clause in the will; and the clause in the codicil only refers to the balance after payment of pecuniary legacies, and cannot apply to sums payable on foot of these annuities: *Weldon v. Bradshaw* (3).

M. R.
1904.

JENNINGS
v.
HANNA.

(1) 23 Beav. 446.

(2) 5 Beav. 142.

;(3) I. R. 7 Eq. 168.

M. R.
1904.
JENNINGS
v.
HANNA.

In *Gray v. Robinson* (1) it was held that there was no intestacy; but there was no gift to annuitants for life. In *Stevens v. Pyle* (2) a testator divided his personal estate into sixths, and gave to each of six legatees one-sixth for life, and after the death of the survivor the whole property to a charity; it was held that the charity took nothing till the death of all the legatees, and that there was an intestacy as to the intermediate income of the share of a deceased legatee. In *Rownd v. Pickett* (3), where there was a gift of moieties of interest and rents to two persons, and a gift on the death of the last survivor, it was held that on the death of one there was an intestacy as to one moiety during the life of the other. In *Swan v. Holmes* (4), where a gift over took effect, the words were "in the case of" the death of the tenant for life, and not "after" the death.

Law, K.C., for William Jennings:—

The will should be read distributively: *Rhodes v. Rhodes* (5). If the words "respective" and "respectively" are read in throughout the will, then on the death of each annuitant the sum of £11 1s. 7d. payable to her went over to William Jennings. A gift after the decease of each means subject to the interest of each: *Lill v. Lill* (6).

The word "devolve" occurred in *Swan v. Holmes* (4), as here, and it was held that the property went over as it was liberated by the deaths of the tenants for life respectively. *Stevens v. Pyle* (2) and *Rownd v. Pickett* (3) were cases in which intestacy could not be avoided.

Day, for Elizabeth Jennings:—

Although the testator divided the annuity into three parts, it must still be regarded as one annuity. The testator so regarded it, as he gave the annuity to the three grandchildren during their minority. The case comes within the principle of *Pearce v. Edwardes* (7) and *Armstrong v. Eldridge* (8), where what was

(1) 11 Ir. Ch. B. 205.

(2) 28 Beav. 388.

(3) 47 L. J. Ch. 631.

(4) 19 Beav. 471.

(5) 7 A. C. 217.

(6) 23 Beav. 446.

(7) 3 Y. & C. Ex. 246.

(8) 3 Bro. C. C. 215.

apparently a tenancy in common for lives was cut down to a joint tenancy, and the survivor took.

The effect of the cases is that where an annuity is given to two persons to be equally divided between them for their lives, with a gift over after the death of both, the survivor takes the whole for life. Theobald on Wills, p. 457. The gift here is really of that character, though, in form, separate annual sums are given.

M. R.
1904.

JENNINGS
v.
HANNA.

Robert Doyle, for William Henry Hanna :—

The executor has money in hand representing the arrears of the annuities, and is ready to abide the order of the Court as to it.

T. J. Smith, in reply :—

No gift to the survivor will be implied where, as here, there are separate gifts of distinct properties for life. *Gardiner v. Sheldon* (1), Tudor's Real Property Cases, 4th Ed., p. 401, citing *Swan v. Holmes* (2); *Sarel v. Sarel* (3); *Turner v. Whitaker* (4); *Lill v. Lill* (5); *Brown v. Jarvis* (6); Jarman on Wills, 5th Ed., p. 1125, note (b). To read the will distributively is to read into it certain words, to carry out the supposed intention of the testator. Here what is given to William Jennings is the Lurgan annuity, and the Court is asked to say that he takes two annual sums of £11 1s. 7d., in events not provided for: *Rhodes v. Rhodes* (7) was a different case. The heir-at-law can only be disinherited by express or clear words. *Gray v. Robinson* (8) shows that "after the demise of the said named grandchildren" means after the decease of the survivor of them.

THE MASTER OF THE ROLLS :—

The question that arises on this originating summons is whether upon the true construction of the will of Francis Jennings, and in the events which have happened, two annual sums of £11 1s. 7d., being each one-third of a perpetual annuity of £33 4s. 8d., charged

(1) *Vaugh.* 259.

(2) 19 *Beav.* 471.

(3) 23 *Beav.* 87.

(4) *Ibid.* 196.

(5) 23 *Beav.* 446.

(6) 2 D. F. & J. 168.

(7) 7 A. C. 217.

(8) 11 Ir. Ch. R. 205.

M. R.
1904.
JENNINGS
v.
HANNA.

upon the lands of Lurgan, Corrakeel, and Drung, in the county of Cavan, are undisposed of, and devolve upon the plaintiff Francis Jennings, as heir-at-law of the testator during the lifetime of the defendant Elizabeth Jennings, or if there is no intestacy, to whom these sums go during her life.

The circumstances of the testator's family are stated in the affidavit of the plaintiff Elizabeth J. Kellett, who is the committee of the estate of the plaintiff Francis Jennings, the heir-at-law of the testator, being the only son of the testator's eldest son John Jennings, who predeceased the testator. He had five other children, one of whom is the defendant William Jennings, and he is admittedly entitled to the annuity of £33 4s. 8d., in fee, from and after the death of the defendant Elizabeth Jennings, one of the granddaughters of the testator.

The testator died so far back as February 23rd, 1874, having made his will, dated September 9th, 1873, and a codicil, dated February 13th, 1874. It is necessary to consider the scheme of this will. It commences with a recital, "Whereas I am possessed of about 60 acres Irish of the lands of Killiduff and Billis, situate in the parish of Killinkene, barony of Castleraghan and county of Cavan, together with twelve cows and three horses, farming implements and house furniture, and also part of the lands of Lavey, containing 45 acres, or thereabouts, situate in the parish of Lavey, barony of upper Loughtee, and county of Cavan, now stocked with twenty-two heifers and bullocks, and twelve sheep; also Derriglea and Corglass, containing about 20 acres Irish, with a mill and kiln thereon, and now stocked with thirteen heifers and bullocks": then comes this recital—"Also an annuity in perpetuity of £33 4s. 8d. sterling out of the lands of Lurgan, Corrakeel, Corramore, and Drung, all situate in the county of Cavan"; "and also a deposit of £1100 in the Ulster Bank, Ballyjamesduff." The testator then proceeds to dispose of the property as follows:—"I will and bequeath to my grandson Francis Jennings, son to the late John Jennings, of Lurgan, all that and those my holding in the lands of Killiduff and Billis, together with all the appurtenances thereunto belonging, and also the present chattels now thereon as above described, with all the farming implements and house furniture when he

arrives at the age of twenty-four years, with condition that he supports my grandchildren, viz.—Margaret Elizabeth, Mary, and Frances, and Elizabeth Jennings, and have them comfortably clothed and instructed according to the wish and will of the executors hereinafter named.”

M. R.
1904.
JENNINGS
v.
HANNA.

There is nothing to define in express words what estate Francis took in these lands; but I think he took an absolute interest in them vesting immediately, but with the possession deferred, and subject to the condition above mentioned. The will goes on:—“And I also enjoin that during the said Francis Jennings’s minority he shall have no connexion with any members of the Lurgan family (his relations) in his domestic concerns; and in the event of his dying during his minority, all the said bequest to be sold and valued, and the proceeds to be equally divided among the surviving legatees; and in the event of his not supplying the foregoing conditions, he forfeits his claim to the above bequest on his being paid £100 sterling thereout; and the grandchildren hereinbefore named shall, during their minority, and until after they are provided for, have sufficient house accommodation in my present dwelling-house in Killiduff.”

Now comes the part of the will as to which the preceding provisions are only mere or less explanatory. “I will and bequeath to my granddaughter Margaret Elizabeth Jennings the sum of £400 sterling; and also £200 to each and every of the other three grandchildren, respectively” (that is to say, to Mary, Frances, and Elizabeth, already mentioned), “and also £11 *ls. 7d.* yearly during their natural lives to each and every of the last three-mentioned children” (*i.e.*, Mary, Frances, and Elizabeth). Up to this, there is nothing to show what the £11 *ls. 7d.* yearly is, or on what it is charged; but it would be a curious sum to give if not explained. It is clear, however, from what follows, that it is specifically one-third of the annuity of £34 *4s. 8d.*, out of the lands of Lurgan, already mentioned, for the will goes on:—“and during their minority the said annuity of the lands of Lurgan to be lodged in their favour in the bank, and the interest thereof to be allowed to them yearly to help to clothe and educate them.” Pausing here, this direction to lodge the annuity in bank would appear to indicate that the entire amount of the annuity when lodged was to be available for

M. R.
1904.
JENNINGS
v.
HANNA.

maintenance; for the interest produced by £34 yearly, even if lodged in bank on deposit receipt, would be very little, so that when the testator used the words "the interest to be allowed to them," he means the annuity. Again, it is to be observed that it is not the annuity of £34 that is to be lodged and applied, but the yearly sum of £11 1s. 7d. The testator had gone through a sum in arithmetic dividing the annuity of £33 4s. 8d. into three parts. Then comes a clause which I regard as of importance: "And in the event of any or all of the above-named grandchildren acting contrary to the wish or will of the executors" (he had directed that they were to be clothed and instructed according to the wish and will of his executors), "each to get only £100 sterling, and the remainder of the bequest to be equally divided amongst the other well-conducted legatees." Pausing here, it is to be observed that in the event of a grandchild acting contrary to the wish and will of his executors, each such grandchild is to get £100 only, and the remainder of the bequest, *i.e.* of Margaret Elizabeth's £400, and of the £200, and the annuities given to each of the three, is to be divided amongst the other well-conducted legatees. The word "bequest" here must include the annuity. It is not to go over, but to be divided among the other legatees. Then come these words:—"And after the demise of the said named grandchildren" (*i.e.* after the demise of *all* the said three named grandchildren) "the Lurgan annuity of £33 4s. 8d. to devolve upon William Jennings, my son." He is a defendant here, and claims the arrears of the two annuities of £11 1s. 7d., which have accrued since the deaths of the two grandchildren, Mary and Frances. Though the testator uses the word "devolve," I do not follow the argument that anything turns on that. The testator then gives his lands of Derrylea and Corglass to his son William, and gives pecuniary legacies to William's daughter, Anna Maria, to his daughter Frances Simmonds, and to his grandson Francis Dyas. He then orders that his present stock on the lands of Lavey and Corglass be disposed of to meet rents and taxes due, and burial expenses; and whatever might remain of the proceeds of the said stock, together with whatever the lands of Lavey might bring by fair sale and valuation (as the case might be), to be equally divided amongst all his legatees; and, lastly, he appoints Edward O'Reilly (who is since

dead) and William Henry Hanna (who is a defendant here) his executors. By the codicil, he gives other pecuniary legacies ; and directs that “ Whatever balance shall remain after payment of the pecuniary legacies given in my will, shall be equally divided among my four granddaughters now residing with me, the daughters of my son James.”

Appeal.
1904.

JENNINGS
v.
HANNA.

On this will there cannot be much difficulty in ascertaining what the testator meant ; he meant to dispose of all his property. He deals with it all. He evidently did not intend to die intestate as to any part of it. It is, however, another question, whether the language he has used is sufficient to dispose of the annuity in all events ? It is contended, on behalf of the heir-at-law, that as each annuitant died, there was an intestacy in the interval between her death and the death of the survivor, and that the annuity bequeathed to her went in that interval, *i.e.*, till the death of the defendant Elizabeth Jennings, who is the surviving annuitant, to him. Mr. Smith, on his behalf, relied on the doctrine not so much referred to nowadays as formerly, that the heir is a favoured person, not to be disinherited except by clear words. The question, however, is, Has the testator disposed of the annuity in the events which have happened ? Mr. Day, on behalf of Elizabeth Jennings, contends that, as survivor, she takes the whole annuity. Mr. Law, on the other hand, on behalf of the defendant William Jennings, contends that as each annuitant died her share went to William. This last contention, if it can be adopted, has the merit of great simplicity. William takes in terms the one entire annuity of £33 4s. 8d., but on no possible construction of the will can he take it until after the death of the survivor of the three grandchildren. It is, of course, possible that all these might die at the same time, as, for instance, if they were killed in a railway accident ; but such a contingency was not thought of. In my opinion, William takes nothing in the principal annuity until after the demise of the said named grandchildren, that is, until the death of the third grandchild, Elizabeth Jennings, who is still alive, and what he takes then is the annuity of £33 4s. 8d., and nothing else. I cannot, therefore, hold, unless coerced by strong authority (but none such has been produced), that he takes during the life of Elizabeth the annuities of £11 1s. 7d. which were payable to

M. R.
1904.
JENNINGS
v.
HANNA.

Mary and Frances during their lives. It is another question whether the testator would not have provided for the event of the lapsing of these annuities if it had occurred to him.

This will differs in one particular from all the cases of other wills which have been referred to. I think there is an indication that there should be a survivorship between the three annuitants. I found this mainly on the clause providing for the event of any one of the grandchildren not acting according to the wishes of the executors.

The clause is—"In the event of any or all of the above-named grandchildren acting contrary to the will and wish of the executors, each to get only £100 sterling, and the remainder of the bequest" (including the annuity) "to be equally divided amongst the other well-conducted legatees." That is an indication that he did not intend that on the annuity of any one grandchild being forfeited, it was to go over to William. I think, therefore, that the testator meant to dispose of everything, and, in particular, of the annuity, and that the whole should go to the survivors, or survivor, during their lives.

The question is, Can I so decide having regard to the authorities? In *M'Dermott v. Wallace* (1), to which I referred during the argument, the testatrix bequeathed all she possessed from the long annuities to the persons thereafter named (that is to say), she gave to Mary and Elizabeth Grant, of Chelsea, the annual sum of £12 to be equally divided during their lives, after which she gave the said sum to Elizabeth French M'Dermott. Elizabeth Grant died in 1831, and Mary Grant in 1841, and the question was, who was entitled to the dividends on the long annuities between 1831 and 1841. It was contended for the representatives of Elizabeth French M'Dermott that the gift to Mary and Elizabeth Grant was for their joint lives only, and that immediately on the death of Elizabeth the long annuities went over to Mrs. M'Dermott. On the other hand, it was argued for the representatives of Mary Grant that the words "after which" meant after the lives of both, and that Mary was entitled for her life by survivorship. The judgment is very short. The Master of the Rolls says:—"The question is doubtful; but, on the whole, I think

that the gift over does not take effect till after the death of Mary." I do not say that that case is exactly in point, but it resembles the present, except that the annual sum of £12 is not split up in words into two annuities of £6 each, but directed to be divided equally between two persons, which is exactly the same thing.

Lill v. Lill (1) was relied on. That case is mentioned by Mr. Theobald, at p. 456, as deciding that a gift to A and B of the sum of £30 each, yearly, so long as they shall live, gives each a separate annuity of £30. But it is not an authority upon the context of the will in the present case, where the testator does more than give separate annuities to each; and that the language of this will is capable of giving the annuity, as a whole, to the survivor is borne out by the cases cited by Mr. Theobald at p. 457, where he says: "If the annuity is given to several for their lives as tenants in common, with a gift over of the annuity as a whole, after the death of the survivor, the effect may be to give the whole annuity to the survivor during his life, as the limitation for life shows that the representatives of a deceased annuitant were not intended to take after his death. Thus, under a gift of an annuity to A and B, to be equally divided between them for their lives, with a gift over after the death of both, or after the death of the survivor, the survivor takes the whole for life: *Armstrong v. Eldridge* (2); *Tuckerman v. Jefferies* (3); *M'Dermott v. Wallace* (4); *Draycott v. Wood* (5).

There is enough in this will to justify me in holding that the whole annuity should continue during the lives of the three grandchildren; and that on the death of one, the sum payable to her should subsist and go to the survivor; and, therefore, that William Jennings takes nothing till after the death of the survivor; and that on the death of Mary, the annuity payable to her became divisible between her sisters Frances and Elizabeth; and that on the death of Frances, Elizabeth took the whole during the rest of her life. The costs will come out of the fund, which, it has been arranged, will be brought into Court.

Solicitor for the plaintiff: *T. Y. Chambers.*

Solicitors for the defendants: *Cochrane; Wynne.* W. L.

(1) 23 Beav. 446. (2) 3 Br. C. C. 215. (3) 3 Bac. Ab. 681.

(4) 5 Beav. 142. (5) 8 L. T. (N. S.) 304.

M. R.
1904.

JENNINGS
v.
HANNA.

Land Com.
1904.

KILKELLY, TENANT; CALDWELL, LANDLORD.

Feb. 12, 13.

May 3.

Appeal.

June 13, 30.

Landlord and tenant—Land Law (Ireland) Acts, 1881 to 1896—Character of holding—“Which is let to be used wholly or mainly for the purpose of pasture”—Lease for lives or term of years expiring in 1891—Covenant to lay down and maintain in grass the entire holding during the last three years of the term—Lands bound by the covenant at the date of the passing of the Land Law (Ireland) Act, 1896—Land Law (Ireland) Act, 1896, sect. 5 (1) (c)—Residential holding.

The holding was demised by lease, dated 17th March, 1863, for three lives (one of which was in being at the date of the tenant's originating notice), or for twenty-nine years, from 1st November, 1862. The lessee covenanted not to plough or plant with manured potatoes any part of the lands after 1st May, 1888, and to lay down in grass so much of the holding as might, before that date, have been broken up, and after that date to maintain the entire holding in grass or feeding ground, and not in tillage of any kind.

By an assignment made in 1872, to which the lessor was a party, the assignee of the lease covenanted with the lessor to keep up the house standing on the holding as a gentleman's residence:—

Held, by the Court of Appeal (FitzGibbon and Walker, L.J.J.; Holmes, L.J., dissenting), affirming the decision of Meredith, J., that the holding, notwithstanding the operation of the covenant by which it had to be used mainly as a pasture holding at the date of the passing of the Act of 1896, was not thereby brought within section 5 (1) (c) of that Act, which excepts from the Land Law (Ireland) Acts a tenancy in a holding which “is let to be used wholly or mainly for the purpose of pasture.

Held, also, by Meredith, J., that the main object of the letting was not shown to be for a residence.

Gaffney v. Fetherstonhaugh ([1900] 2 I. R. 417) discussed and distinguished (1).

REHEARING before the Irish Land Commission.

By lease, dated the 17th day of March, 1863, and made between Charles B. Caldwell, of the one part, and Richard Maguire, of the other part, reciting a prior lease of the hereditaments thereafter demised, dated 18th day of June, 1849; and

(1) Consider whether *Thompson v. Cleland* ([1896] 2 I. R. 190), not cited, is to be taken as overruled by this decision.—[KEP.]

made by Charles Andrew Caldwell (then deceased) to Richard Maguire (the lessee) for a term of three lives or thirty-one years, from the 1st day of May, 1849, whichever should longest last, and reciting that two of the lives in the said recited lease were then dead, and reciting that Richard Maguire had expended £500 in buildings and improvements according to plans and specifications approved of by the said Charles B. Caldwell, who was then the owner of the rent and reversion expectant on the determination of the said lease, and reciting an agreement for a new lease, it was witnessed that in pursuance of the said agreement and in consideration of the surrender of the said former lease, and the rents and covenants thereafter contained, Charles B. Caldwell demised to Richard Maguire all that and those certain lands called Moatfield, Grange, and New Grange, situate in the barony of Slane and county of Meath, together with the rectorial and impropriate tithes of the said demised premises, to hold the same unto Richard Maguire, his heirs, executors, administrators, and assigns, for the lives and life of the said Richard Maguire, and his sons Thomas Daniel Maguire and Mathew Maguire (then aged, respectively, thirty-four and twenty-eight), or for the term of twenty-nine years to be computed from the 1st day of November, 1862, yielding and paying the yearly rent of £382 6s. 9d. sterling, payable as therein mentioned, and also yielding and paying an additional rent of £3 for every acre or part of an acre set, let, aliened, or parcelled out to under-tenants without the lessor's consent in writing (small tenements to labourers of the lessee employed to labour on the demised premises as tenants at will excepted) with the usual powers of distress and entry securing both the said rent and the said additional rent. Covenants by the lessee to keep the demised premises and all houses, buildings, fences, ditches, drains, trees, and other improvements in good and tenantable order and condition, and so to yield up at determination of the demise, and not to commit waste. Further covenant by the lessee "that the said Richard Maguire, his heirs, executors, administrators, or assigns, shall not plough any part of the said lands, hereby demised, from, and after, the 1st day of May, which shall be in the year 1888, nor will the said Richard Maguire, his heirs, executors, administrators, or assigns, after the said 1st day of May, 1888, set or plant any

Land Com.
1904.

KILKELLY,
Tenant;
CALDWELL,
Landlord.

Land Com.
1904.

KILKELLY,
Tenant;
CALDWELL,
Landlord.

part of the said lands with manured potatoes, except such portion thereof as may be necessary for his or their own use, not exceeding 10 acres of land, without the consent of the said Charles B. Caldwell, his heirs, or assigns, first thereunto had in writing." Proviso reserving an additional rent of £10 per annum for every acre ploughed in breach of the foregoing covenant. Further covenant by the lessee that "the said Richard Maguire, his heirs, executors, administrators, and assigns, shall and will lay down and sow with a full and sufficient quantity of grass seeds all and every part of the said demised premises that shall be planted or broken up before the said 1st day of May, 1888, in smooth and flat ridges, and keep and preserve the same in grass or feeding ground, and not in tillage of any kind unless with the consent in writing of the said Charles B. Caldwell, his heirs and assigns as aforesaid, and in default thereof shall pay a further additional or increased rent of £5 for every acre that shall not be sufficiently sowed with grass seeds, laid down and preserved as grass or feeding ground in manner aforesaid, over and above all other rents hereby made payable." Covenant by the lessor for quiet enjoyment.

The lessee's interest in this lease was assigned to Andrew Tiernan by an indenture dated 7th August, 1872, in which the said Charles B. Caldwell joined and consented to the assignment thereby made, in consideration of the covenants therein contained on the part of the said Andrew Tiernan, which included a covenant that "the said Andrew Tiernan, his heirs, executors, administrators, and permitted assigns, will, at all times, during the unexpired residue of the term aforesaid, keep in his own occupation all and singular the lands and premises hereinbefore expressed to be hereby assigned, and also keep up the house now standing thereon as a gentleman's residence and in good tenantable order and repair, and shall and will within one year from the date of these presents put the outbuildings and offices belonging thereto into good and substantial repair, and so keep the same during the residue of the term granted by the said lease, and also shall and will preserve intact from injury all ancient mounds, stones, and caves, now standing, lying, or being in, upon, or under, the said assigned premises."

The lessee's interest in the lands was sold to Mr. John Kilkelly

for £8705 in the Chancery Division of the High Court of Justice, in proceedings instituted before the Land Judge, and was conveyed to him by the Land Judge's conveyance dated 25th February, 1898.

Land Com.
1904.
KILKELLY,
Tenant;
CALDWELL,
Landlord.

While one of the lives named in the lease was still in being, Mr. Kilkelly served an originating notice to fix a fair rent of the holding. The originating notice stated the acreage of the holding as being 337 acres and 29 perches statute measure, and the Poor Law Valuation as £422.

The Sub-Commission fixed the fair rent of the holding at £397 12s. 6d.

Both landlord and tenant served notices requiring the case to be heard before the Irish Land Commission, and the case came before Mr. Justice Meredith. The evidence as to the character and user and other circumstances connected with the holding are stated in his judgment.

Cherry, K.C., and A. C. Meredith, for the tenant.

Wakely, K.C., and Chaytor, for the landlord.

The arguments appear sufficiently from the judgment.

MEREDITH, J. :—

The acreage in this case is considerable, comprising 337A. 0R. 29P. statute measure; the Poor Law Valuation is £422, and the old rent was £382 6s. 9d. The Sub-Commission presided over by Mr. Commissioner Bailey had the assistance of learned counsel, who appeared before them, and argued the various points that have been discussed on the re-hearing. The Lay Assistant Commissioners visited the holding. I am of opinion that the conclusion arrived at by the Sub-Commission was correct, so far as regards the decision that the tenant was entitled to have a fair rent fixed in respect of the holding. I differ with the Sub-Commission as regards the amount of the rent, but, of course, that is another matter.

The legal questions raised would, I think, never have been raised at all if the tenant, Mr. Kilkelly, had not been, perhaps I

May 3.

Land Com. may say, somewhat precipitate in his action. If he had waited
 1904. until the expiration of the lease of 1863, and come in under the
KILKELLY, 21st section of the Act of 1881, I doubt if many of the questions
Tenant; that have been debated would have been debated and argued
CALDWELL, at all.
Landlord.

Meredith, J.

The grounds upon which the landlord resists the application of the tenant to fix a fair rent are stated in his notice of appeal. The first of these grounds is that the main object of the letting was for a residence. Having regard to the acreage of the holding, the relative value of the land and buildings, and the entire history of the case, I am of opinion that that ground is absolutely unsustainable. Mr. Wakely, for the landlord, no doubt did not press that point, so far as regards the state of affairs in 1863—or, perhaps I should say, he did not unduly press it—but he relied on the assignment of the 7th of August, 1872, and the covenant contained in that assignment as to keeping up the house as a “gentleman’s residence”; and he contended that whatever the original object of the letting might have been, the effect of the covenant was to define and determine the object of residence as the main object of the letting then and thenceforth during the residue of the term. Well, I think it is sufficient for me to say that the covenant is quite plainly a covenant relating to the dwellinghouse, and not to the holding; and so far from being an argument that the main object of the letting—that is the letting of the entire holding—was for the purpose of residence, it would appear to me that it was almost an argument the other way. There is no doubt that the intention of the parties to the assignment of 1872 was that the dwellinghouse was to be kept up as a gentleman’s residence, but there certainly is nothing in the deed of assignment or covenant that would indicate that this large tract of 337 acres was to be dealt with as a residential holding, or used in any way except as a farm. The report of the Assessor in reference to this point is of some importance in the case, and it confirms the view which I took upon the evidence. He says that the buildings are extensive, and mostly of a solid and superior character—there is no doubt about that—“but not too good, in my opinion, for a holding of this size situate in the county Meath,” and that the buildings are in a fair state of repair. And after

wards he says that the plantations, gardens, and shrubberies are of a trivial nature from a residential point of view. Having regard to the evidence, I entirely agree with that; and I am of opinion that upon the first point, viz., that the main object of the letting was for a residence, the contention of the landlord has failed.

The second point upon which the landlord seeks to exclude the tenant is that the lands were let to be used wholly or mainly for the purpose of pasture. Well, the evidence is, and the report of the assessor is, that the lands are suitably used as a grazing farm. So are most lands in Meath. The assessor says "the lands are used as a grazing farm"; and in reply to query No. 2 he says that "they are suitably used, and in a very good condition; the herbage is of a very superior quality, and most of the holding would fatten cattle or sheep. Portion of the farm shows traces of having been tilled within fifteen years. Though nearly all could be tilled, it is much more suited to grazing. About twenty acres are liable to floods." Well, I think the same could be said of a great many farms in respect of which fair rents have been fixed, not only in the county Meath, but in other parts of Ireland. I have no doubt that the latter-day tendency is towards permanent grass; and in this case there is no doubt that for a considerable time the holding has been suitably used as a grazing farm. But in cases of this description (*i.e.*, where the object or purpose of a letting becomes material) the Court was bound (at all events up to the passing of the Act of 1896) to find that the "object" or "purpose" of the letting was one which was common to the mind of both parties to the contract, and which related not to the user at one particular time or season, but to the user of the holding during the continuance of the letting regarded as a whole; and in ascertaining that purpose, not merely to have regard to, but to rank as of chief importance, the terms of the contract of letting itself, if the contract of letting was in writing. And here I have the lease of 1863; and having regard to the provisions contained in that lease, I should, without hesitation (prior to the decision of *Gaffney v. Fetherstonhaugh* (1)), have declared that the lease was sufficient in

Land Com.
1904.

KILKELLY,
Tenant;
CALDWELL,
Landlord.

Meredith, J.

Land Com.
1904.

KILKELLY,
Tenant;
CALDWELL,
Landlord.

Meredith, J.

itself to negative the contention of the landlord. I will go further, and say that there was nothing in the history or the nature or character of the holding or its user that would enable the landlord to succeed in this case. But Mr. Wakely and Mr. Chaytor argue that the Land Act of 1896 has practically altered the law as it existed prior to 1896, and that having regard to the decision of the Court of Appeal in *Gaffney v. Fetherstonhaugh* (1), I must concentrate my gaze on one particular date, namely, the date of the passing of the Act of 1896—the 15th August, 1896—and that I must ascertain and determine the rights of the parties in this case, and the object and purpose of the letting within the meaning of the Land Acts, by the obligations which existed upon that particular day with reference to the user of the holding.

Now, the words of the 5th section of the Act of 1896 upon which reliance is placed are as follows:—"The Land Law Acts shall not apply to the following tenancies:—(c) To a tenancy in a holding (other than a holding let to be used wholly or mainly for a dairy farm) which is let to be used wholly or mainly for the purpose of pasture." The word "is" is a small word; but if the contention of Mr. Wakely and Mr. Chaytor is correct, the £8705 paid by Mr. Kilkelly to the Land Judge in 1898 for this tenancy is so much money thrown into the sea, and not merely that, but the money he spent in repairs to the buildings on the holding is gone. Still Mr. Kilkelly is not entitled to have the law altered for him by reason of the fact that he has paid this enormous sum for the holding, nor, on the other hand, is he to get less justice than a tenant who did not happen to be a gentleman possessed of large means, as I assume from the figures Mr. Kilkelly must be.

In my opinion, the contention of Mr. Wakely and Mr. Chaytor is wrong. I think I should be pushing the decision in *Gaffney v. Fetherstonhaugh* (1) to a point never dreamt of by the Court of Appeal if I were to hold that the Court was bound to look for the purpose of the letting, not as a whole during the entire of the letting from start to finish, but upon the particular day that the Land Act of 1896 was passed. I think "is let" and "let" mean exactly the same thing; and it is a curious fact that in clause (c) of the 5th section of the Act of 1896, they are certainly used as

synonymous terms. I cannot conceive that the Legislature meant for a moment that the Court must ascertain the purpose of the letting in the case of dairy farms in the old way, and the purpose of letting for pasture generally in the new way. The decision in *Heuston v. Cloncurry* (1) shows that the genus is the class of holdings let to be used for the purpose of pasture (wholly or mainly), and the species the class of holding let to be used for the purpose of dairying; and it would be extraordinary to my mind if a different point of time was to be regarded in one case from that to be regarded in the other. Further, I think that the 9th section of the Act of 1887 and the decisions under that section are important. "A holding shall not be deemed to constitute a townpark, though within the definition of the expression 'town parks' in section 58 of the Land Law (Ireland) Act, 1881, if it is let and used as an ordinary agricultural farm." I think that "is let" there is equivalent to "let" within the meaning of all the decisions under the Act of 1881. This being so, I agree with Mr. Cherry that from 1863 to 1888 the terms of the contract of letting demonstrate that the tenant was perfectly free to deal with this as an ordinary farm. The term of the lease is for three lives or twenty-nine years, and the covenant contained in the lease that the tenant is not to plough any portion of the land after 1888 means that during the last three years of the term of years, and thenceforth if the lease continues, he is not to break up any portion of the lands. No doubt it is a covenant that is not very applicable in the case of a concurrent term of lives and years; apparently a similar covenant is embodied in the Caldwell Estate leases, and apparently in all these leases a period of three years from the date of the expiration of the term of years is fixed upon for the commencement and operation of that covenant.

I do not go into the question whether, under the further covenant, the holding must be in pasture during the residue of that time. It is argued on the one hand that there is nothing to restrict meadowing; and, on the other, that the tenant is forbidden to do so. I look upon the covenant as being a covenant to cultivate (during what the parties conceived would be the

Land Com.
1904.

KILKELLY,
Tenant;
CALDWELL,
Landlord.

Meredith, J.

Land Com. residue and tag end of the term) the holding in such a way as that
 1904. the landlord would take it up in grass, and not in tillage, or as a
KILKELLY, mixed farm.
Tenant:

CALDWELL, As a matter of fact, in the present case, the term of years ran
Landlord. out before the lives expired, and the last life dropped only last
Meredith, J. year; but from 1863 to 1888 I think there is no manner of doubt
 that this holding was not let to be used for the purpose of pasture;
 and, as I say, if the case had come in under the 21st section of
 the Act of 1881, I do not think that there would have been any
 doubt upon the matter at all. I have not been able to find a
 reported case upon the point, but I am aware of my own knowledge,
 and from my practice at the Bar, of cases in which there were
 covenants in leases to deliver up the land in grass at the expira-
 tion of the term, and this Court held that a lessee coming in under
 section 21 of the Act of 1881, or under the Act of 1887, should
 not be excluded upon the ground that, at the expiration of his
 lease, the lands should, or would, be in grass according to the
 covenant.

Therefore, unless I am to confine my gaze to the 15th of
 August, 1896, I find the covenant to be only a circumstance of the
 case, and a circumstance of the letting; and taking the purpose
 and object of the letting as a whole, I find that there is neither
 contract nor obligation capable, or not capable, of being enforced,
 common to the minds of both parties to the contract of letting,
 sufficient to exclude the tenant in the present case from the
 provisions of the Land Acts.

Now, one or two other points remain to be dealt with. The
 first is that the holding is not substantially agricultural or
 pastoral in its character. On that point, I am clear that the
 holding is substantially agricultural and pastoral in its charac-
 ter. The evidence demonstrates that. And then it was
 argued the land is demesne land. There is no evidence to
 sustain that. And, lastly, it was said that the buildings are
 the property of the landlord. I am of opinion that the buildings
 are partly the property of the landlord, and partly of the tenant.
 Thus far I agree with the conclusions arrived at by the Sub-
 Commission; but I do not agree with their conclusion in reference
 to value. I was struck very much during the evidence with the

very superior nature of the land on this farm, and I find I have arrived at the same conclusion as the assessor has done. It was argued very strenuously that a rent fixed in 1863 ought not to be raised in 1904, but it may be; and I am disposed to think that it is a fact that the rent fixed in 1863 was an extremely low rent. The entire history of the holding must be taken into consideration, and, on the whole, I adopt the estimate of the assessor, and I fix the fair rent of the holding at £424 10s. Each party must abide his own costs.

Land Com.
1904.

KILKELLY,
Tenant;
CALDWELL,
Landlord.

Meredith, J.

W. C. S.

The landlord (pursuant to leave obtained) appealed to the Court of Appeal (1) on the grounds (as stated in the notice of appeal) that the holding was not, and is not, substantially either agricultural or pastoral in its character, or partly agricultural and partly pastoral, and that the main object of the letting of the said holding was for a residence, and that the said holding was let to be used wholly or mainly for the purpose of pasture within the meaning of the Land Law (Ireland) Acts, and is of the rateable value of upwards of £100.

The last surviving life had dropped before the appeal came on to be heard.

The Solicitor-General, K.C., Wakely, K.C. (with them Chaytor),
for the appellant.

Cherry, K.C., and A. C. Meredith, for the respondent.

The arguments appear sufficiently from the judgments. It was not argued by counsel for the appellant in the Court of Appeal that the main object of the letting was for a residence.

FITZ GIBBON, L.J. :—

The decision of this case depends upon the interpretation and effect of the words in the Land Act, 1896, section 5 (1) (c), which exclude from the Land Law Acts a tenancy “in a holding which

June 30.

(1) Before FITZ GIBBON, WALKER, and HOLMES, L.JJ.

Appeal.
1904.

KILKELLY,
Tenant;
CALDWELL,
Landlord.

Fitz Gibbon,
L.J.

is let to be used wholly or mainly for the purpose of pasture." The question is, perhaps, difficult, it is certainly precise and pointed; but before coming to it, it is necessary to state the terms of the contract of letting, the circumstances of the holding, and the other matters which, by a long series of decisions, have been held to be material.

The lands were let by lease, dated March 17, 1863, by Charles Benjamin Caldwell to Richard Maguire. The lessee held them at the date of the demise under a lease of June 18, 1849, for three lives, or thirty-one years from 1849, and one of the lives was still in being in 1863. The new lease of 1863 was granted in consideration of the surrender of the former lease of 1849, and it was granted for three lives, or twenty-nine years, from November 1, 1862. The term of years expired on November 1, 1891, but one, at least, of the lives was still in being at the commencement of the proceedings by the tenant to fix a fair rent. The last life has, however, now fallen, and his right to retain the possession therefore now depends upon his right to fix a fair rent. The lease described the demised premises as three parts of the lands of Newgrange, with certain rectorial and impropriate tithes, as theretofore held by the lessee, containing in all 335A. 1R. 34P. The reserved rent was £382 6s. 9d. There is a gentleman's residence upon the holding, but it is not mentioned in the parcels. The lessee covenanted to keep the premises and all houses, buildings, fences, ditches, drains, trees, and other improvements, in good and sufficient tenantable repair and condition. Contentions that the holding was residential; that it was not agricultural or pastoral; and that it consisted of demesne land, were at one time put forward, but they were not pressed before the Land Commission or here, and the only serious contention on the part of the landlord now is that the holding is from the Land Acts excluded as a "pasture holding." Some reliance was placed here by the tenant upon his power to use the lands for meadowing, as distinguished from pasture, but I do not propose to rest my judgment upon that ground, as it seems to me devoid of solid foundation. For some time after the letting, the lands appear to have been tilled to a considerable extent; but since 1888, and possibly for some years before that, they have been substantially used as a Meath pasture

farm, the lands being of the quality peculiarly suitable for pasture to be found in that county.

The express provisions of the lease with respect to the user of the lands have been held to be the first guide to the purpose of the letting. The lease provides an increased rent of £3 an acre for any land parcelled out to under-tenants, small tenements for labourers employed by the lessee to labour on the demised premises, and tenants at will, excepted. There is but one restriction by covenant upon the user of the lands otherwise than for pasture. The lessee covenanted not to plough any part of the lands after May 1, 1888, nor after that day to plant any part of the lands with manured potatoes, except such portion, not exceeding 10 acres, as might be necessary for his own use, and to pay an additional rent of £10 for every acre ploughed or planted with potatoes, without licence of the lessor; also to lay down and sow with a sufficient quantity of grass seeds all and every part of the lands that should be planted or broken up before May 1, 1888, in smooth and flat ridges, and to keep and preserve the same in grass or feeding-ground, and not in tillage of any kind, unless with the lessor's consent in writing, and in default thereof to pay an increased rent of £5 for every acre not treated according to this covenant.

At the date of the lease in 1863 the youngest life was aged twenty-eight, therefore, at the expiration of the term of years, he must have been aged fifty-seven. The covenant to lay down covered the last three years of the term of twenty-nine years, and any further period during which a life might survive. I am satisfied that it must be conceded to the landlord, upon the terms of the lease, that from the date at which that covenant came into operation, the lands could not be used otherwise than mainly for the purpose of pasture. But Meredith, J., has held for reasons stated in his judgment—which are entirely satisfactory to me—that from the date of the lease, March 17, 1863, down to May 1, 1888—that is to say, for the first twenty-six years of the demise—there was no sufficient evidence, either upon the face of the lease, or upon the user, or otherwise, that the lands were to be used wholly or mainly for the purpose of pasture. Therefore, during that time, unless the covenant to which I have referred was

Appeal.
1904.

KILKELLY,
Tenant;
CALDWELL,
Landlord.

Fitz Gibbon,
L.J.

Appeal.
1904.
KILKELLY,
Tenant ;
CALDWELL,
Landlord.
Fitz Gibbon,
L.J.

sufficient of itself to prove that the lands were "let to be used wholly or mainly for the purpose of pasture," the holding, so far as the purpose of the letting was concerned, was within the Land Acts.

Thus the question is reduced to this :—Whether the Act of 1896, sect. 5 (1) (c), excludes the holding, by confining the ascertainment of *the purpose of the letting* to the period of the demise subsequent to May 1, 1888 ? In other words :—Did the purpose of the letting *change* in 1888 ? It has been settled by a series of authorities that in determining the purpose of a letting, the whole period of it, and the evidence as well of the contract as of the circumstances and of the user throughout the whole term, must be considered : but the purpose of the letting, when ascertained, seems to me to be one and indivisible, and I can find no authority for holding that that purpose, once ascertained, can change. I cannot understand a kaleidoscopic purpose. A man may take land for thirty-one years, or for any other term, expressly for the purpose of tillage, and yet he may covenant to lay the land down in grass during the last three years of his term, and to give it up in pasture at the expiration of his tenancy. This shows that "the purpose of the letting," to which both parties must be privy, cannot be determined solely by the condition in which the land is to be given up when the letting ends. If I am right in that, the contention that the passing of the Act of 1896 is the starting-point for ascertaining the purpose of a letting previously made, and then current, must be unfounded. No matter when or how the question arises, it seems to me that the answer to the question—"What was the purpose of a letting ?" must always be the same. The fact that for twenty-six years of a term certain of twenty-nine years, the tenant could till the lands, coupled with the fact that for a considerable number of years he did till a substantial portion of them, could no more be rejected as evidence that the purpose of the letting was *not* mainly for pasture, than could the fact that he covenanted to lay them down in 1888, and to keep them in grass or feeding-ground from that date, be rejected as evidence to the contrary. But whenever the evidence came to be weighed, the finding as to the preponderance of evidence, in my opinion, ought to be the same, whether the question was raised in 1863, in 1888,

in 1896, or now. If that be so, the decision in *Gaffney v. Fetherstonhaugh* (1), by which we are bound, does not apply. In that case the terms and nature of the condition necessitated the fixing of the state of facts on which it depended at a date other than that of the letting; but it may become necessary to ascertain the purpose of a letting at any time during the letting, or at its determination, and if that purpose must always be ascertained in the same way, the principle of *Gaffney v. Fetherstonhaugh* (1) has nothing to do with this case.

The words "is let" in the Act of 1896 speak, as *Gaffney v. Fetherstonhaugh* (1) decided, as of the date of that Act. But the words are not "is now by contract used." If they may be paraphrased, they seem to me to mean "is now held under a letting of which the purpose was that the holding should be used wholly or mainly for the purpose of pasture." The lands were held in 1896 under the same letting under which, for twenty-six years, they had not been let wholly or mainly for that purpose. The user in 1896 was evidence of the purpose for which they had been let in 1863, and for which they continued to be let until the letting expired. But the main purpose for which they were let could not, in my opinion, change whenever the terms of the letting obliged the lessee to change his user of the demised premises.

Endless difficulties may be suggested as the certain consequence of the opposite principle of interpretation. For example, what would be the consequence of a covenant for rotation, fixing recurrent periods of pasture and of cropping? Could the application of the Land Acts depend upon whether the letting, being for an uncertain term of lives, with or without a concurrent fixed term of years, happened to expire while the lands were in grass or in tillage?

But we are not to speculate, and I think the best, and only certain, interpretation of the Act is that which makes the whole or main purpose for which the lands are let, a thing ascertainable at any time, but always with the same result, so long as the letting lasts.

In my opinion the judgment of Meredith, J., is right. Lord

Appeal.
1904.

KILKELLY,
Tenant;
CALDWELL,
Landlord.

Fitz Gibbon,
L.J.

Appeal. Justice Walker concurs in the conclusion and opinions which I
 1904. have expressed, and therefore the appeal must be dismissed with
KILKELLY, costs.
Tenant ;
CALDWELL,
Landlord.

WALKER, L.J.:—

The principal question in this case turns upon the true construction of sub-sect. (1) (c) of the 5th section of the Act of 1896, which provides that the Land Law Acts shall not apply to “a tenancy in a holding (other than a holding let to be used wholly or mainly for a dairy farm) which is let to be used wholly or mainly for the purpose of pasture.”

It was argued that on the contract of letting in the present case the holding on May 1, 1888, became and thenceforward continued to be a holding let for the purpose of pasture, and therefore it was such on August 15, 1896, and being such, it was one which under the words “is let” in the 5th section was excluded from the Land Law Acts. I assume, for the purposes of the point which I am now considering, that on May 1, 1888, it became a holding only capable of being used for the purposes of pasture, irrespective of what it had been and was under the contract of letting of 1868 as a whole. It was said under these circumstances that the case of *Gaffney v. Fetherstonhaugh* (1) in this Court conclusively established that the 15th day of August, 1896, was the crucial date for ascertaining for all purposes what was called the status of the tenancy, and that it was fixed in law as it was then found as fact.

Now, first, I think the case of *Gaffney v. Fetherstonhaugh* (1) does not decide that the character of the holding (pasture letting or not) is to be conclusively determined by what in fact it was on August 15, 1896. It did decide that the words “is ordinarily used,” in sub-sect. (1) (c) (ii), refer to the actual ordinary use on August 15th, 1896, just as the words “is in the occupation” in the 58th section of the Act of 1881 made the date of the Act the crucial date according to *Nelson v. Headfort* (2). Holmes, L.J., says:—“In the case before the Court we are dealing with a pasture holding; and it seems to follow necessarily from the

(1) [1900] 2 I. R. 417.

(2) 18 L. R. Ir. 407.

judgment in *Nelson v. Headfort* (2) that when the 4th sub-section of the 58th section speaks of a holding the tenant of which does not actually reside thereon, the residence here indicated must also be referred to the time of the passing of the Act; and if this be so, it is impossible to hold that the proviso that follows, and which excepts a holding that is ordinarily used with the residential holding relates to a different period." And then, after pointing out that the 58th section had been, as to the matter in hand, repealed, he refers to the Act of 1896 as "a new enactment taking the place of the old one that is expressly repealed, and *prima facie* its language must be regarded as referring to the period when it first became law. It seems," he says, "to follow from *Nelson v. Headfort* (1) that the residence on the holding and the ordinary user mentioned in the new provision are residence and user on August 15th, 1896." I respectfully concur in that decision, even if I were not bound by it; but the case is a decision on the words "is ordinarily used," and is not a decision on the construction of the words "which is let to be used wholly or mainly for the purpose of pasture." The ordinary user is a state of things existing as a fact collateral to the contract of letting; whereas the words "is let to be used" mean, I think, "is held under a letting made wholly or mainly for the purpose of pasture," and the character "wholly or mainly" must be gathered from the contract of letting as a whole. I think it would be impossible to say that if there were a thirty-one years' term ending in 1897, and the contract of letting provided that in the last year of the term—including the 15th day of August, 1896—the land should be in pasture, though in law and in fact by user it had been agricultural for twenty-nine years, its actual state on August 1st, 1896, made it a holding "let to be used wholly or mainly for the purpose of pasture," and so the character of the holding—whether to be a pasture holding or not—should change from time to time during the letting—agricultural up to 1896, and thence to 1897 wholly or mainly for pasture.

The character must, I think, be found in the contract of letting, and from it its main character gathered, but the circum-

Appeal.
1904.

KILKELLY,
Tenant;
CALDWELL,
Landlord.

Walker, L.J.

Appeal.
1904.

KILKELLY,
Tenant;
CALDWELL,
Land ord.

Walker, L.J.

stances of rateable value, the residence of the tenant, and the ordinary user of the holding are collateral facts to be found as at the date of the Act of 1896.

It is difficult to see why "let to be used" should not have the same construction as "let to be used wholly or mainly for a dairy farm" in the same sub-section. It seems to me there are several instances in the section in which "is" must, by reason of the subject-matter, apply to the date of 1896—such as the rateable value, the residence, or the ordinary user; but when the purpose of the letting—pasture or not—is to be ascertained in this section, it must be ascertained by what the contract of letting does. The 9th section of the Act of 1887 puts that view in express words when it uses the words "is let and used" as an ordinary agricultural farm.

Thus I think the case of *Gaffney v. Fetherstonhaugh* (1) is an authority only on the point of time at which we are to look for the "ordinary user." If the date of 1896 does not determine the character of the letting, but the contract of letting only does, then the question is what on this contract is the purpose. Is it wholly or mainly for pasture? In my opinion, the contract as a whole does not so provide; and, therefore, it is not wholly or mainly a pasture letting.

As to the point argued that the covenant does not by the words "in grass or feeding-ground, and not in tillage" exclude meadowing, and that, therefore, the holding could all be meadowed under the contract, I think—having regard to the district in which the lands are situate, and the case decided in this Court of *Byrne v. Hill* (2) and other cases—the words imply that the lands shall be in pasture, and, therefore, I think we are bound to decide the general question on the 5th section. On this point I think, as I have already intimated, that the decision of Mr. Justice Meredith was right and should be affirmed.

HOLMES, L.J. :—

This case was dealt with by Meredith, J., and opened in this Court by the Solicitor-General on the basis that by the terms of

(1) [1900] 2 I. R. 417.

(2) 30 L. R. Ir. 603.

the lease of 1863, the tenant of the holding, while at liberty up to 1888 to use it for any purpose, agricultural or pastoral, was bound from that year to the determination of the demise to use it for grazing.

Appeal.
1904.
KILKELLY,
Tenant;
CALDWELL,
Landlord.

If I am to act on this assumption, I cannot come to the conclusion arrived at by the Land Commission, nor can I agree with the view taken by my colleagues of the provision contained in the 5th section of the Land Law (Ireland) Act, 1896, relating to grazing farms. The words to be construed are as follows:—
“The Land Law Acts shall not apply to a tenancy in a holding (other than a holding let to be used wholly or mainly for a dairy farm) which is let wholly or mainly for the purpose of pasture” if it is of a certain rateable value. I have long since abandoned the attempt to bring the Irish Land Acts into harmony with each other or with any general governing principle. The only safe guide is to give their language its ordinary meaning, and to accept the consequences, however unexpected they may be. I have often followed this rule with very favourable results to the tenants; and I have also acted on it in cases, comparatively few, where the landlord has been the gainer. The section from which I have quoted took the place of previous legislation on the same subject, and it is now unnecessary to consider the repealed provisions for which it was substituted. It describes holdings of different kinds which are excluded from the Land Law Acts; and there is a variety of tense in the several descriptions. Confining myself to those which refer to the letting or contract of tenancy, I find in subsection (1), “any holding the main object of the letting of which was for a residence.” Here we must go back to the date of the letting for the purpose of ascertaining whether the holding comes within the description. A little later in the section we find the words, “land which when first demised was demesne, and which the provisions of the contract of tenancy or the circumstances of the case show was intended to be preserved as demesne.” There is no doubt that the intention thus referred to must be shown to have existed when the letting was made.

Holmes, L.J.

There follows the provision I have quoted as to grazing farms, and in it the description is “a holding which is let to be used wholly or mainly for the purpose of pasture.” The change of

Appeal.
1904.
KILKELLY,
Tenant;
CALDWELL,
Landlord.
Holmes, L.J.

tense is remarkable; and in ascertaining the period to which these words apply, I cannot give them the same construction as if they were a holding "which when first demised," or a holding the main object of the letting of which was for a residence. They must mean either at the time of the passing of the Act or at the time of the application. Of these constructions, I think the first is most in accordance with previous decisions. Indeed, *Gaffney v. Fetherstonhaugh* (1) seems to me to be strongly in point. It arose on one of the provisoes that follow the words now under consideration. Let me read all the material portions of the clause, "a holding which is let to be used wholly or mainly for the purpose of pasture, if the tenant does not actually reside on the holding, or where the holding adjoins, or is ordinarily used, with another holding; then on the latter holding."

In *Gaffney v. Fetherstonhaugh* (1) it was held that the period pointed to by the words "is ordinarily used" is the date of the passing of the Act of 1896. Is it possible with any regard to consistency to say that the words "is let to be used" occurring in the same sentence do not refer to the same time?

In the great majority of cases it would, doubtless, be impossible to show that the intention as to user entertained by the parties when the letting was made was altered by them during the continuance of the term. But this may be occasionally possible. The tenant may, during the term, contract with his landlord for valuable consideration that he will thereafter use the lands only for pasture. In the present case by the lease itself the tenant agreed that in and after 1888 he would use all the holding for grass or feeding land.

In 1896 the letting was subject to this stipulation, and if these words mean pasture, the lands are then let wholly for that purpose.

The principal argument in support of the contrary view was, as I understand it, that two contradictory purposes cannot be attributed to the same letting. It is, no doubt, impossible to do so at the same date. I could not have said in 1870 or 1880 that this holding was then let wholly or mainly for the purpose of

(1) [1900] 2 I. R. 417.

pasture, inasmuch as the tenant was then, and for years afterwards, at liberty to till all the lands. But this does not prevent me from holding that in 1896 the lands were let to be used as grass or feeding-ground only. Another argument was derived from the form of the exception of dairy farms where the word is simply "let," but it is clear that "let" here must have the same meaning as "is let" in the general provision from which dairy farms are excepted. The conclusion which I am led to by the language of the section seems also to be in accordance with the general policy that grazing holdings of a certain value were to be excluded from the operation of the Acts. The effect of the judgment of the Land Commission will be to create a perpetual tenancy with a right to periodic revision of the rent in a holding which must always be used for grazing. For these reasons, if the decision of this appeal rested with me, I should be unable to follow Mr. Justice Meredith.

Appeal.
1904.

KILKELLY,
Tenant;
CALDWELL,
Landlord.

Holmes, L.J.

A matter was referred to in this Court which he did not notice. It is said that by the terms of the lease there may be an unlimited mowing of the holding after 1888. When this point was first mentioned, I thought it somewhat formidable; but after further consideration, I am of opinion that the lease cannot be construed in this way. The words "grass or feeding-land" must, I think, mean pasture in this instrument. The lands are in county Meath, where grass lands are nearly always pasture, and the addition of "feeding-land" shows that this is what is meant.

This becomes, however, of no practical importance, as the majority of the Court agree with Meredith, J., on the other branch of the case.

Solicitor for the tenant: *The tenant in person.*

Solicitors for the landlord: *Montgomery & Chaytor.*

G. Y. D.

M. R.
1904.

IN RE KILKENNY CORPORATION; EX PARTE
SHORTAL.

Nov. 11.

Solicitor—Bill of costs—Solicitors' Remuneration Act, 1881—General Order, 1884, Schedule I., Part II.—Building lease—Scale of charges.

A lease of a house in a town was made to a Municipal Corporation for the purpose of a technical school, for thirty-five years, at the yearly rent of £35, with a covenant by the lessees to expend £250 within two years from the date of the lease in improvements and alterations, according to the specification of an engineer. The matters provided for in the specification did not involve rebuilding, but comprised a good deal of new work and structural alterations, in addition to repairs:—

Held, that the lease was a building lease within the General Order, and that the costs of the lessor's solicitor for preparing it were to be taxed accordingly.

In re Hogan's Estate ([1894] 1 I. R. 503) followed.

SUMMONS.

This was an application on behalf of Mr. Nicholas Shortal, of Kilkenny, solicitor, to review the taxation of a bill of costs furnished by him for the preparation of a lease. The Corporation of Kilkenny agreed to take a lease from Mr. T. W. O'Hanrahan of a house in Parliament-street, Kilkenny, for the purpose of a technical educational establishment, or public library, for a term of thirty-five years, at a rent of £35 a year, with a clause of surrender every year, and with a covenant by the lessees to spend £250 within two years from the date of the lease on improvements and alterations, according to the specification of the engineer to the Corporation. The nature of the covenant, and of the work to be done, is stated in the judgment of the Master of the Rolls. Mr. Shortal's claim for remuneration was based on the scale provided by Schedule I., Part II., of the General Order of 1884, made under the Solicitors' Remuneration Act, 1881, for building leases. The claim for this in the bill of costs was as follows:—"Scale for all my charges as lessor's solicitor, for preparing, settling, and completing lease and counterpart herein, yearly rent £35, lease

containing a covenant for expenditure of £250 for improvements and alterations in the premises according to plan and specification, £11."

M. R.
1904.

In re
KILKENNY
CORPORATION

The Taxing Master was of opinion that the house was not a building lease, but was a lease at a rack rent, and allowed £3 only, the amount provided by the General Order in the case of a lease at a rack rent, other than a lease for building purposes. Mr. Shortal objected to this ruling, and the matter was argued before the Taxing Master, but he adhered to his ruling, being of opinion that the lease was a lease at a rack rent, and was only a repairing lease, and not a building lease.

Cooper, in support of the application :—

This is a building lease. From the description of the works in the specification it appears that they are not merely repairs, but structural alterations and additions of a substantial character. The lease is as much a building lease as was the second lease in *In re Hogan's Estate* (1), which Monroe, J., held to be a building lease. The principle of that decision applies, although the facts were not the same. The lease there was for a term of ninety-nine years, at the rent of £40, with a covenant to expend £300 at least in permanent improvements. No new buildings were to be erected. Monroe, J., held in that case that the definitions of building purposes and building lease in the Conveyancing Act, 1881, sect. 2 (x), and in the Settled Land Act, 1882, sect. 8 (1), did not apply, but they show the meaning the Legislature considered should be put upon those terms (2).

Chaytor, for the lessees :—

The lease is not a building lease; the specification shows that no building of any permanent kind was to be erected, only repairs

(1) [1894] 1 I. R. 503.

(2) It was also argued that if the lease was not a building lease it was not a lease at a rack rent; and was either a long lease not at a rack rent, in which case the same scale applied, or it was a short lease not at a rack rent, in which case it was not within Schedule I.; but as no decision was given on these points, the arguments are omitted.—[REP.]

M. R.
1904.

In re
KILKENNY
CORPORATION

made. The lease in *In re Hogan's Estate* (1) was different. The house there would have become a ruin, and had practically to be rebuilt. Here the house was let for thirty-five years only for a technical school, with a clause of surrender every year. There is no suggestion that the house is likely to fall down. The definitions of the Conveyancing and Settled Land Acts do not apply. It was necessary to insert special definitions in those Acts.

Cooper, in reply :—

The lease is no less a building lease because it is for a term of thirty-five years only. *Hallett to Martin* (2), and *In re Daniell's Settled Estates* (3), where leases were made for similar terms.

THE MASTER OF THE ROLLS :—

This is an application on behalf of Mr. Shortal, solicitor, to review the taxation of the costs of preparing a lease from Mr. O'Hanrahan to the Kilkenny Corporation.

It is important to observe that the Corporation, on the occasion of this lease being made, came into possession of the premises for the first time. There was no liability upon them for repairs under an old lease. The lease in question was a new lease to them. The facts of the case are different from those of the second lease in *In re Hogan's Estate* (1), where the house was almost in ruins; but it is analogous to that case, the subject-matter of the lease being the same, namely, a house. The lease before me is a lease for thirty-five years, at a rent of £35, of a house in the city of Kilkenny taken for the purpose of a Technical School, and contains, in addition to the ordinary covenant to repair, a covenant by the lessees to expend within two years from the date of the lease a sum of £250 in improvements and alterations of the premises according to the plan and specification prepared for the lessees by Mr. James F. Reade. It also contains a proviso that "the lessees may during the continuance of the term make any further structural or other alterations in the premises as may from time to time be certified by a qualified civil engineer as not likely to injure the stability of the premises, and at the expiration, or other sooner

determination of the term, the lessees shall be bound to restore the premises to the state they were in previous to such further alterations, but this shall not apply to any alterations comprised in the said plan and specification of Mr. Reade, which alterations the lessees shall not be bound to remove or restore except the partition in the top storey as shown in the said plan, and which partition is to be restored if the lessor so desires.”

M. R.
1904.

In re
KILKENNY
CORPORATION

When the specification is looked at, it appears that apart from the question of degree the works to be done are very like those mentioned in the case of the second lease in *In re Hogan's Estate* (1). First of all the roof is to be thoroughly overhauled and put in perfect repair. Then the eave gutters are to be taken down, and new gutters of a particular pattern substituted. An iron grating is to be fixed in the opening at the back of the steps, and three iron gratings are to be removed, and glass street-lights substituted. The flagging in the yard is to be taken up and any sound flags relaid, and the remainder of the yard is to be concreted. Two water-closets in the yard are to be taken down, and new ones put up in the house. The specification then provides various things to be done in the interior—floors repaired and made good, windows repaired, partitions constructed, and so forth. A great deal of the matters with which the specification is conversant are in the nature of repairs, but a good deal of it is new work. What I have to consider is whether it is not within the principle laid down by Monroe, J., in *In re Hogan's Estate* (1) as to the second lease in that case. Nothing had to be done to the outer walls of the house there any more than here.

Monroe, J., says:—“I do not consider myself bound to accept these definitions” (*i.e.*, under particular statutes) “which undoubtedly include ‘repairing leases’ under ‘building leases,’ when I am construing the rules made under another statute, which contains no such definition. I must look at the whole circumstances of the contract, the subject-matter of the demise, and the nature and extent of the expenditure, to enable me to say whether this can properly be called a building lease. I find that the subject-matter of this lease is to all intents and purposes merely a

M. R. dwelling-house and offices; that the house is almost in ruins”
1904. (here it is in a very dilapidated state); “that there is hardly any-
In re thing left standing except the outer walls; that the roof is gone,
KILKENNY the ceilings are gone, and the floors are gone; and I fail to see
CORPORATION why the restoration of these important and necessary parts of a
house is not to be called ‘building’ as well as the erection of the
outer walls from the foundation. There is to be an expenditure
of a sum equal to between seven or eight years’ rent, and some-
thing, therefore, very like the construction of a new dwelling.”

Here there is to be an expenditure of a definite sum of money, of similar amount. I think that it would be very hard on the solicitor to contend that this lease was not a building lease. I am of opinion that the principle laid down by Monroe, J., which I have quoted, is in point. I also am of opinion that his decision was right, and that a lease may be a good building lease, though no entirely new premises are to be built. Anyone who read the specification here would say that the work required by it to be done was builder’s work. Mr. Shortal is, therefore, entitled to have the costs of a building lease allowed, and the Corporation must pay the costs of this application.

Solicitor for applicant: *The Applicant in person.*

Solicitor for the Corporation: *Buggy.*

W. L.

INDEX.

ACQUIESCENCE—Mortgage - - - 388
See FOLLOWING ASSETS.

ADMINISTRATION — Distribution amongst legatees—Claim of mortgagee to follow assets - - - 388
See FOLLOWING ASSETS.

— Marshalling—Mortgage and simple contract creditors - - - 100, 113
See MARSHALLING.

ADMINISTRATION ACTION — Insolvent estate—Judgment against executors 376
See INSOLVENT ESTATE. 1.

— Insolvent estate—Secured creditor - 299
See INSOLVENT ESTATE. 2.

— Trading by executor under provisions in will —Costs, charges, and expenses—Deficient estate—Priority - - - 334, 340
See TRADING BY EXECUTOR.

AFTER-ACQUIRED PROPERTY — *Will—Executors—Settlement—Married woman—Bequest—Restraint on anticipation.* A testator bequeathed certain freehold property and a legacy of £5000 to his daughter, a married woman, for her sole and separate use, independent of any husband she might marry, without power of anticipation. The settlement executed on the marriage of his said daughter contained an “after-acquired” property clause. Testator nominated executors of his will, but did not appoint trustees:—*Held*, that as there was no intention expressed in the will that the executors were to act as trustees, and retain the fund, the fund should be paid over to the testator’s daughter free from restraint, and that it was captured by the “after-acquired” clause in her marriage settlement. *Russell v. Lawder*

[BARTON, J. 328

AGE—of appointee, when instrument exercising power comes into operation 452, 460
See EXECUTION OF POWER. 2.

ANNUITY—Gift to grandchildren during their lives—Implied gift to survivor - 540
See SURVIVOR. 1.

ANTICIPATION — Restraint on — Bequest — After-acquired property - - - 328
See AFTER-ACQUIRED PROPERTY.

APPEAL—From final order in chambers—Motion to discharge - - - 120
See TIME.

— From order of Judicial Commissioner—Tithe rentcharge—Assessment of price
See TITHE RENTCHARGE. 2. [496, 500

APPORTIONMENT — Rent—Compulsory purchase—Defence Acts - - - 354
See COMPULSORY PURCHASE.

BEQUEST.

See LEGACY.

BONUS—Land Act, 1903, sect. 48—Tenant for life—Sale to tenants - - - 66, 492
See LAND LAW (IRELAND) ACTS. 4, 5.

BOTTLES—Embossed name registered 310, 321
See TRADE MARK.

BOUNDARY — Highway — Right of public to deviate - - - 247, 252
See WAY.

BUILDING LEASE — *Solicitor for lessor—Costs—Solicitors’ Remuneration Act, 1881—General Order, 1884, Schedule I., Part II.—Scale of charges.* A lease of a house in a town was made to a Municipal Corporation for the purpose of a technical school, for thirty-five years, at the yearly rent of £35, with a covenant by the lessees to expend £250 within two years from the date of the lease in improvements and alterations, according to the specification of an engineer. The matters provided for in the specification did not involve rebuilding, but comprised a good deal of new work and structural alterations, in addition to repairs:—*Held*, that the lease was a building lease within the General Order, and that the costs of the lessor’s solicitor for preparing it were to be taxed accordingly. *In re Hogan’s Estate* ([1894] 1 I. R. 503) followed. *In re Kilkenny Corporation; Ex parte Shortal* - - - M. R. 570

CASES—*Ball v. Graves* (18 L. R. Ir. 224) followed
See COMPULSORY PURCHASE. [354

— *Dames-Longworth’s Estate, In re* (25 Ir. L. T. 521) discussed - - - 237
See TRUSTEE.

— *Efrench’s Estate, In re* (21 L. R. Ir. 283) followed - - - 461
See PRIORITY. 1.

CASES—continued.

- *Gaffney v. Fetherstonhaugh* ([1900] 2 I. R. 417) discussed and distinguished 560, 559
See **CHARACTER OF HOLDING**.
- *Gardner v. Gardner* (2 A. C. 723) distinguished - - - - 434
See **ILLEGITIMACY**.
- *Giles, In re* (43 Ch. D. 391) followed 120
See **TIME**.
- *Hogan's Estate, In re* ([1894] 1 I. R. 503) followed - - - - 570
See **BUILDING LEASE**.
- *Leahy v. De Moleyns* ([1896] 1 I. R. 206) distinguished - - - - 388
See **FOLLOWING ASSETS**.
- *Lill v. Lill* (23 Beav. 436) distinguished 540
See **SURVIVOR**. 1.
- *Lindgren v. Lindgren* (9 Beav. 358) followed
See **SPECIFIC LEGACY**. 1. [519]
- *M'Dermott v. Wallace* (5 Beav. 142) followed
See **SURVIVOR**. 1. [540]
- *Ridgway v. Newstead* (2 Giff. 492; 8 DeG. F. & J. 474) applied - - - 388
See **FOLLOWING ASSETS**.
- *Selwood v. Mildmay* (3 Ves. 306) followed
See **SPECIFIC LEGACY**. 1. [519]
- *Shropshire Union Railways and Canal Co. v. Reg.* (L. R. 7 H. L. 496) distinguished
See **PRIORITY**. 1. [461]
- *Sloane's Estate, In re* ([1895] 1 I. R. 146) followed - - - - 461
See **PRIORITY**. 1.
- *Whitaker, In re* ([1901] 1 Ch. 9) followed
See **INSOLVENT ESTATE**. 1. [376]
- CHAMBERS**—Order in—Motion to discharge
See **TIME**. [120]

CHARACTER OF HOLDING—Landlord and tenant—Land Law (Ireland) Acts, 1881 to 1896—“Which is let to be used wholly or mainly for the purpose of pasture”—Lease for lives or term of years expiring in 1891—Covenant to lay down and maintain in grass the entire holding during the last three years of the term—Lands bound by the covenant at the date of the passing of the Land Law (Ireland) Act, 1896—Land Law (Ireland) Act, 1896, sect. 5 (1) (c)—Residential holding.] The holding was demised by lease, dated 17th March, 1863, for three lives (one of which was in being at the date of the tenants' originating notice), or for twenty-nine years, from 1st November, 1862. The lessee covenanted not to plough or plant with manured potatoes any part of the lands after 1st May, 1888, and to lay down in grass so much of the holding as might, before that date, have been broken up, and after that date to maintain the entire holding in grass or feeding ground, and not in tillage of any kind. By an assignment made in 1872, to which the lessor was a party, the assignee of the lease covenanted with the lessor to keep up

CHARACTER OF HOLDING—continued.

the house standing on the holding as a gentleman's residence:—*Held*, by the Court of Appeal (Fitz-Gibbon and Walker, L.J.J.; Holmes, L.J., dissenting), affirming the decision of Meredith, J., that the holding, notwithstanding the operation of the covenant by which it had to be used mainly as a pasture holding at the date of the passing of the Act of 1896, was not thereby brought within section (5) (1) (c) of that Act, which excepts from the Land Law (Ireland) Acts a tenancy in a holding which “is let to be used wholly or mainly for the purpose of pasture.” *Held*, also, by Meredith, J., that the main object of the letting was not shown to be for a residence. *Gaffney v. Fetherstonhaugh* ([1900] 2 I. R. 417) discussed and distinguished. *Kilkelly, tenant; Caldwell, landlord*

[MEREDITH, J. 550; APP. 559]

CHARGE ON LAND—Payment by tenant for life - - - - 130, 146

See **TENANT FOR LIFE AND REMAINDERMAN**. 2.

— **Tithe rentcharge**—First estate of inheritance - - - - 272

See **TITHE RENTCHARGE**. 1.

CHILD—Action to establish illegitimacy—Jurisdiction—Presumption of paternity 434
See **ILLEGITIMACY**.

CIVIL BILL—Equitable—Service out of the jurisdiction - - - - 123
See **COUNTY COURT**.

COMMITTEE—Lunatic—Execution of fee-farm grant - - - - 147
See **LUNATIC**.

COMPANY—Prospectus—Waiver of lien by vendor to company - - - - 530
See **VENDOR'S LIEN**.

COMPULSORY PURCHASE—Defence Acts—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 119—Portion of lands held under lease—Apportionment of rent—Date from which apportioned rent becomes payable.] Portion of lands in the occupation of a statutory tenant was required by the Secretary of State for War for the purposes of the Defence Acts. Notice to treat was given, and the rent was apportioned by agreement, as provided by sect. 119 of the Lands Clauses Act, 1845:—*Held*, that the apportioned rent only was payable from the date of the agreement, although no entry had taken place. *Ball v. Graves* (18 L. R. Ir. 224) followed. *In re War Secretary and Hurley's Contract* - - - M.R. 354

CONDITION—Whether precedent or subsequent—Will—Construction.] A testator left the residue of his property, real and personal, to his only son, provided he should claim same within three years from the testator's death; and in case the son should have died in his lifetime, or without claiming said bequest within three years, it should

CONDITION—*continued.*

lapse; and in the event of the bequest lapsing, or not being claimed within the said period, testator left the residue to his brother, who should also be entitled to the rents and profits of same during the three years, or such lesser period as should elapse before the son should claim. The son was abroad at the time of his father's death, and did not become aware thereof, or of the terms of the will, until after the expiration of the three years. He contended that the condition was a condition subsequent, and that he, being heir-at-law, did not forfeit the real estate by the non-performance, through ignorance, of the condition:—*Held*, that the condition was a condition precedent, and that, accordingly, the gift over took effect. *Horrigan v. Horrigan* - - - V.-C. 29; App. 271

CONSPIRACY—Action charging—Claim for injunction and damages - 400, 428
See TRIAL.

CONTRIBUTION—*Principle of—Landlord and tenant—Action for recovery of land for non-payment of rent—Salvage payment by sub-tenant.*] Lands, held for ever subject to a fee-farm rent, were sold in lots in the Landed Estates Court. Six lots were made primarily liable to the head rent in certain proportions, and were bound to indemnify the remaining lots accordingly. Many years afterwards the head rent fell into arrear, owing to the default of the owners of some of the indemnifying lots to pay their proportion, and an ejectment for non-payment of rent was brought by the head landlord. The plaintiff, who was a sub-tenant of part of one of the indemnified lots, paid the rent and costs in order to save the lands from eviction, and claimed contribution from the owners of the several lots:—*Held*, that the plaintiff was entitled to contribution on the principle of salvage, and that the owners of the lots should contribute according to the value of the lots at the date when the salvage payment was made. *Allison v. Jenkins* - - - M. R. 341

COSTS—Building lease—Scale of charges 570
See BUILDING LEASE.

—Executor carrying on trade—Priority 334, 340
See TRADING BY EXECUTOR.

—Injunction—Nuisance caused by direction of Sanitary Authority - - - 211
See NUISANCE. 1.

COUNTY COURT—*Equity jurisdiction—Service out of the jurisdiction—40 & 41 Vict. c. 56, ss. 33, 34.*] Where the County Court has jurisdiction to deal with a case so far as its subject-matter is concerned, it has all the powers of the High Court necessary for bringing all proper parties before it, including the power to serve or substitute service of the civil bill out of Ireland. *Sexton v. O'Halloran* - - - App. 123

COVENANT AGAINST INCUMBRANCES

—Mortgage - - - 100, 113
See MARSHALLING.

COVENANT AGAINST TRADING—Publican—Spirit Grocer—Lease - 206
See SPIRIT GROCER.

COVENANT AS TO MANAGEMENT OF HOLDING—Land Law (Ireland) Acts
See CHARACTER OF HOLDING. [550, 559]

COVENANT TO PAY—Quit rent—Payment by persons not liable—Lost grant 474,
See LOST GRANT. [480]

COVENANT TO RENEW—*Landlord and tenant—Contract—Lease for lives renewable for ever—Lessee bound to accept renewal—Implied covenant—Limited owner—Remainderman—Agreement fixing fair rent—Statutory powers—Land Law Acts—Redemption of Rent Act—Vendor and purchaser.*] In a lease for lives renewable for ever, the *habendum* was to the lessee, his heirs and assigns, for the lives therein, and any others to be added, in pursuance of the covenant for perpetual renewal therein contained. There was a declaration that the lessee was to have a perpetual interest:—*Held*, that there was an implied covenant on the part of the lessee to accept renewals. In 1885 the last life in the lease dropped. In 1892 a fair rent was fixed by statutory agreement between the tenant for life of the reversion and the owner of the lease, reducing the rent considerably. This was not done under the Redemption of Rent Act, but the letting was treated as an ordinary tenancy from year to year. The tenant put up his interest for sale by auction, describing it as a judicial tenancy at the reduced rent:—*Held* (on a vendor and purchaser summons), that the landlord, as tenant for life, had no power to waive his right to compel the tenant to accept renewal, and that the agreement reducing the rent was not binding on those entitled in remainder. *Trench v. Wallace* - - - M.R. 290

COVENANT TO REPAIR—Breach of by tenant for life - - - 240
See TENANT FOR LIFE AND REMAINDERMAN. 1.

COVENANT TO SETTLE—Bequest—Restraint on anticipation - - 328
See AFTER-ACQUIRED PROPERTY.

DAMAGES—Claim for—Charge of conspiracy—Trial—Jury - - - 400, 428
See TRIAL.

DEATH WITHOUT ISSUE—Will—Gift over
See SURVIVOR. 2. [35, 41]

DEBENTURES—Loan fund society—Winding up - - - 87
See LOAN FUND SOCIETY.

DEFENCE ACTS—Apportionment of rent 354
See COMPULSORY PURCHASE.

DEVIATION—Highway—Boundary 247, 252
See WAY.

DIRECTION TO CARRY ON TRADE—
 Executors' costs, charges, and expenses—
 Priority - - - 334, 340
See TRADING BY EXECUTOR.

DIRECTION TO SETTLE—*Will*—*Settlement*
 —*Gift to son*—“*In the event of marriage to be put in strict settlement*”—*Form of settlement*—*Jointure*—*Executory trust*.] A testator devised real and personal estate to his son, and directed that in the event of his son getting married this property should be put in strict settlement. The son died, leaving a widow and three infant daughters, one infant daughter having predeceased him. An action was brought to carry out the trusts of the will. A second infant daughter died before the hearing of an application for an order, declaring the rights of the parties:—*Held*, that the two deceased daughters, having died before attaining age, or marrying, could take no share in the property directed to be settled, and that the Court, in the exercise of its jurisdiction in carrying out the executory trust, had power to, and would, provide an annuity, by way of jointure, for the widow, and that, subject thereto, the property should be held in trust for the two infant daughters, in equal shares, as tenants in common in fee, on their respectively attaining twenty-one, or marrying, and that in case one only should attain that age, or marry, then the whole in trust for that one.
Wright v. Wright - - - M. R. 360

EFFECTS—Construction of will—Gift of all my household furniture and effects in my residence - - - 155
See SPECIFIC LEGACY. 2.

EJUSDEM GENERIS—Rule of construction
See SPECIFIC LEGACY. 2. [155]

EQUITABLE CIVIL BILL—Service out of the jurisdiction - - - 123
See COUNTY COURT.

EQUITABLE MORTGAGE—Trust fund—
 Right of *cestuis que trustent* to follow—
 Priority—Conflicting equities 280, 461
See PRIORITY. 1, 2.

ESTATE IN FEE—Tithe rentcharge—First estate of inheritance, or perpetual estate equivalent thereto - - - 272
See TITHES RENTCHARGE. 1.

EVIDENCE—Parol—Rebutting implied trust for next of kin - - - 486
See EXECUTOR.

— Parol—Specific legacy—Misdescription 519
See SPECIFIC LEGACY. 1.

— To rebut presumption of paternity - 434
See ILLEGITIMACY.

EXECUTION OF POWER—*Intention to execute*—*Special power*—*Reference to power*.] Where it is manifest, on the construction of a will, that

EXECUTION OF POWER—*continued*.
 the testator intended to dispose thereby of property of his own, and also of property over which he had a special power of appointment, and under the disposition made by the will the property, subject to the power, is given to a member of the class amongst whom it can be appointed, the property passes under the power, it being immaterial whether the testator supposed that the property passed by the power or by virtue of his own interest therein. *Byrne v. Cullinan* APP. 42

2. —*Settlement*—*Special power*—*Remoteness*.] A testator being entitled, under settlement executed on his marriage in 1877, to a life interest in lands, with power of appointment to child, or children after his death, by his will, dated 20th May, 1896, appointed all the lands comprised in the settlement to one daughter, on her attaining twenty-five. The testator died in 1901, when the appointee was fifteen years old:—*Held*, that the appointment was not void for remoteness. *In re Hallinan's Trusts* - M. R. 452; APP. 460

EXECUTOR—*Gift of residue to*—*Will*—*Implied trust for next-of-kin*—*Secret trust*—*Parol evidence*—*Admissibility*.] A testator by his will bequeathed to his executors legacies for their trouble in administering his estate, and disposed of the residue as follows:—“I bequeath all the residue of my property of every kind to my executors, to apply the same as they shall think fit, and I appoint as my executors *A* and *B*.” The testator's next-of-kin were his brother *T*. and the ten children of his late brother *C*. After the execution of the will one of the executors asked the testator how he would like the residue spent. The testator replied that he would like the six younger children of his late brother *C*. to get it, and that he did not wish the elder children of *C*. to get any, and that he would not like his brother *T*. to get a penny. The six younger children of *C*. claimed that the above conversation created a secret trust of the residue in their favour, to the exclusion of the rest of the next-of-kin:—*Held*, that, upon the face of the will, the executors did not take beneficially, but upon an implied trust for the next-of-kin; that such a trust could not be varied by a conversation between the testator and one of the executors after the execution of the will, and that the doctrine of secret trust had no application to the facts of the case. *Balfe v. Halpenny* BARTON, J. 486

— Authorized trading by—Deficient estate—
 Costs, charges, and expenses of executor
 — Priority - - - 334, 340
See TRADING BY EXECUTOR.

— Interest transmissible to - - - 284
See OPTION TO PURCHASE.

— Judgments against—Administration of insolvent estate—Payment *pari passu* 376
See INSOLVENT ESTATE. 1.

EXECUTOR—*continued.*

— Legacy to married woman—Restraint on anticipation—Capital whether payable to legatees or to be retained by executors
See AFTER-ACQUIRED PROPERTY. [328]

EXECUTORY TRUST—Settlement—Form of
See DIRECTION TO SETTLE. [360]

FAIR RENT—Facilities for obtaining seaweed for kelp - - - - 20
See LAND LAW (IRELAND) ACTS. 1.

— Fixed by agreement—Limited owner—Obligation on lessee to renew - - 290
See COVENANT TO RENEW.

FEE-FARM GRANT—Execution on behalf of lunatic - - - - 147
See LUNATIC.

FINAL ORDER—Chambers—Appeal—Time
See TIME. [120]

FOLLOWING ASSETS—*Claim on covenant in mortgage against legatees of mortgagor—Lapse of time—Proceedings in Land Judge's Court—Non-receipt of interest for many years—Intention to rely on security—Acquiescence—Alteration in position of legatees—Special circumstances disentitling mortgagees to relief against legatees.* The plaintiffs, *W.* and wife, were mortgagees of land for £1000, under a deed made in 1880, containing a personal covenant for payment. The plaintiffs made a sub-mortgage to *D.* for £600, and subsequently took proceedings in the Land Judge's Court for the sale of the lands. An absolute order for sale was made in July, 1882; and in the following January a receiver was appointed. In the schedule of incumbrances *D.* was first mortgagee in respect of his sub-mortgage for £600, and plaintiffs were second mortgagees in respect of £400, balance of their mortgage debt. The mortgagor died in January, 1887, having bequeathed certain farms and pecuniary legacies to his children, one of whom became his personal representative. The plaintiffs, in answer to statutory advertisements, in the same year gave notice of their debt. The estate of the mortgagor was distributed, and the legatees went into possession of the property bequeathed to them. After January, 1887, the plaintiffs received no interest on their mortgage debt. In April, 1889, most of the tenants offered to buy at seventeen years' purchase. The plaintiff *W.*, in view of this offer, obtained leave to bid, and in May, 1889, was declared the purchaser at £1100. He thereupon became ostensible owner in possession, dealing directly with the tenants, and endeavoured to effect a sale to them. Not being satisfied with the sum which the Land Commission offered to advance, he refused to proceed further with the sale, and, being unable to provide his own purchase-money, he was, in February, 1890, discharged from his purchase, the question of his liability for any deficiency on a re-sale being reserved. From

FOLLOWING ASSETS—*continued.*

September, 1892, no interest was received by *D.* or the first mortgagee; and, after the discharge of the plaintiff *W.* from the purchase in 1890, no step was taken until 1898, when the provisions of section 40 of the Land Law (Ireland) Act, 1896 (59 & 60 Vict. c. 47), were applied to the case. Three of the tenants, paying rents amounting to £15 a year, having refused to buy their holdings, in respect of which the Land Commission offered to advance £295, the plaintiff *W.* was allowed by the Court to become purchaser of the reversion of these three tenancies for £100, in order that the sales to the other tenants might be carried out. The total amount thus realized by the sale of the estate was only sufficient to pay, besides costs, the principal and interest due on the first mortgage, leaving £400 for principal and more than £400 for arrears of interest due to *W.* and wife. In April, 1903, the plaintiffs brought an action against the personal representative and legatees of the mortgagor claiming that under the personal covenant in the mortgage his estate, which had been distributed in 1887, was liable for the principal and interest then due on their mortgage. The personal representative did not defend the action:—*Held*, that the plaintiffs were entitled to judgment against the personal representative, but that there were special circumstances in the case disentitling them to follow the assets which had been distributed, and that they were not entitled to relief against the legatees. *Ridgway v. Newstead* (2 Giff. 492; 3 D. F. & J. 474) applied; *Leahy v. De Moleyns* ([1896] 1 I. R. 206) distinguished. *Wellwood v. Grady*

[BARTON, J. 388]

GIFT ON CONDITION—Passing to executor
See OPTION TO PURCHASE. [284]

GIFT OVER—Will—Death of any or either of three legatees without issue 35, 41
See SURVIVOR. 2.

HIGHLAND CATTLE—Introducing breed of
 — Resumption of holding - - 4, 7
See LAND LAW (IRELAND) ACTS. 2.

HIGHWAY—Boundary—Right of public to deviate - - - - 247, 252
See WAY.

HOLDING—Character of - - - 550, 559
See CHARACTER OF HOLDING.

— Resumption of—Reasonable purpose - 4, 7
See LAND LAW (IRELAND) ACTS. 2.

HOSPITAL—For smallpox cases—Residential district - - - - 161, 171
See NUISANCE. 2.

HUSBAND AND WIFE—After-acquired property—Bequest—Restraint on anticipation - - - - 328
See AFTER-ACQUIRED PROPERTY.

HUSBAND AND WIFE—*continued.*

— Declaration as to illegitimacy—Jurisdiction—

Presumption of paternity - - 434

See ILLEGITIMACY.

— Legacy to husband to be settled strictly—

Form of settlement—Widow whether
entitled to provision - - - 360

See DIRECTION TO SETTLE.

ILLEGITIMACY—*Declaration as to—Declaratory judgment—R. S. C., Ir., Order XXV., Rule 5, —Presumption of paternity.*] *A* brought an action against *B*, his former wife, from whom he had obtained a divorce, and *C*, her infant child, whom *B* alleged to be the child of the plaintiff, for a declaration that *C* was not the child of the plaintiff, and sought an injunction to restrain *B* from alleging that *C* was his child. The marriage took place in Scotland in May, 1894. There was one child, a boy, born shortly after the marriage. The parties did not live together as man and wife after March, 1895. The plaintiff resided near the town of *E*. in Scotland until the 13th April, 1898, when he left for India, and did not return till November, 1900. In 1896 *B* came to live in the town of *E*. with the boy, and was living there when the plaintiff left in April, 1898. In December, 1898, *B* gave birth to a girl, the defendant *C*, in Ireland, and registered the plaintiff as the father of the girl. She did not inform him of the birth of the child. In 1900 the plaintiff obtained a divorce in Scotland from *B* on the ground of her adultery with *D*, and the custody of the boy was given to her, in pursuance of an agreement between her and the plaintiff which contained a recital that there was only one child of the marriage, namely, the boy. *B* afterwards married *D*, and was resident in Ireland at the time of action brought:—*Held*, that the Court had no jurisdiction to entertain the action. *Seem*, that even if the Court could entertain the action, the evidence did not rebut the presumption of paternity. *Gardner v. Gardner* (2 A. C. 723) distinguished. *Yool v. Ewing*

[M. R. 434]

INDEMNITY—Executor and trustee—Direction

to carry on trade - - - 334, 340

See TRADING BY EXECUTOR.

— Salvage payment—Contribution—Time of

ascertaining value - - - 341

See CONTRIBUTION.

— Trustee selling with—Breach of covenant

to repair—Blot on title - - - 240

See TENANT FOR LIFE AND REMAINDER-
MAN. 1.

INFANT—*Practice—Management of land during minority—Appointment of trustees—Infant absolutely entitled by will—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 42, sub-s. 1.*] Section 42, sub-section 1, of the Conveyancing and Law of Property Act, 1881,

INFANT—*continued.*

enabling the Court to appoint trustees on the application of a guardian or next friend of an infant beneficially entitled to the possession of any land, applies to the case of an infant taking absolutely by will. *In re Bradshaw* M. R. 18

— Salvage expenses—Mortgage by trustees
authorized - - - 513

See SALVAGE EXPENSES.

INJUNCTION—Claim for—Mode of trial 400,

See TRIAL. [428]

— to restrain assertion of legitimacy—Jurisdiction - - - 434

See ILLEGITIMACY.

— to restrain discharge of sewage - 211

See NUISANCE. 1.

— to restrain erection of smallpox hospital 161,

See NUISANCE. 2. [171]

INSOLVENT ESTATE—*Administration—*

Judgment creditors—Priority—Judicature Act (Ireland), 1877 (40 & 41 Viet. c. 57), sect. 28, sub-sect. 1.] In the administration of the assets of a person whose estate has proved insufficient to pay his debts, judgment creditors will be paid *pari passu*, and not in priority of time. *M'Causland v. O'Callaghan* - - - APP. 376

2. — *Administration—Secured creditor holding security from third party—Proof by—Payment from third party—Reduction of proof—Right to payment, provided creditor does not receive more than 20s. in the £.*] *J. B.*, by his will, dated the 6th January, 1870, left all his real and personal estate to his wife, for life, and he left several legacies to his children, payable after the death of his wife, which he charged upon his real and chattel real estates, and, subject thereto, he left the residue of his real and personal estates to his wife. The testator died on the 27th February, 1870. After his death his widow went into possession, and some of the legatees applied to her for payment of their legacies during her lifetime, and she agreed to the proposal. The money was borrowed from an Insurance Company, the repayment being secured by three deeds of mortgage, by which the legatees so paid mortgaged their legacies to the Insurance Company, and covenanted for payment of the amount advanced. *Mrs. B.* also covenanted with the Insurance Company for payment, and charged her life estate and the residue with the repayment of the amount advanced. The Company advanced for payment of the legacies the sum of £5400. *Mrs. B.* died on the 16th July, 1891, and her estate proved insolvent, but the interest on the mortgages had been paid down to her death. In the proceedings to administer her assets the Insurance Company proved for £5400, on foot of the covenants contained in the mortgage deeds, without valuing the other securities which they held. Subsequently payments were made to them from the proceeds of the sale of the

INSOLVENT ESTATE—*continued.*

lands in the Land Judge's Court, where the lands were sold, and by the Receiver out of the rents and profits after the death of Mrs. B., which reduced the amount due to them to £3138 3s. 7d. On the final allocation of the funds:—*Held* (affirming the decision of Chatterton, V.-C.), that the Insurance Company were entitled to receive a dividend on the full amount of their debt as proved, without deducting therefrom the payment received, provided that they did not receive more than 20s. in the £.

Browne v. Browne - - - APP. 299

— Authorized trading by executor and trustee—
Costs, charges, and expenses—Priority
See **TRADING BY EXECUTOR.** [334, 340]

INTENTION—To keep charge in existence
[130, 146]

See **TENANT FOR LIFE AND REMAINDERMAN.** 2.

— To pass property subject to special power 42
See **EXECUTION OF POWER.**

ISSUES—*Practice, Chancery Division*—Trial by jury—*Settling issues of fact*—*Chancery Amendment Act, 1858, s. 4 (21 & 22 Vict. c. 26)*—*Judicature Act (Ireland), 1877, s. 42 (40 & 41 Vict., c. 57.)* Where, under section 42 of the Judicature Act (Ireland), 1877, the issues of fact, arising in an action in the Chancery Division, have been ordered to be tried by a jury empanelled in a Court of the Chancery Division, it is not necessary, under section 4 of the Chancery Amendment Act, 1858, to settle, before the trial comes on for hearing, the issues of fact to be ultimately submitted to the jury:—*Quære*—Whether the English practice, under which Chancery Judges may send an action or issues of fact arising in an action to be tried at Assizes, or at the Jury Sittings, is not available under the Irish Rules 3 and 38 of Order XXXVI. *De Freyne v. Fitzgibbon and others* (No. 2) BARTON, J. 429

JUDGMENT—Against executors—Insolvent estate—Administration - - - 376
See **INSOLVENT ESTATE.** 1.

— Breach of covenant to repair - - - 240
See **TENANT FOR LIFE AND REMAINDERMAN.** 1.

JURISDICTION—County Court—Service of equitable civil bill - - - 123
See **COUNTY COURT.**

— Land Commission—Appointment of trustees—Superior interest - - - 237
See **TRUSTEE.**

— Lunacy - - - - - 147
See **LUNATIC.**

— Supreme Court—Action to establish illegitimacy - - - - - 434
See **ILLEGITIMACY.**

JURY—Trial by—Action charging conspiracy—Claim for injunction and damages
See **TRIAL.** [400, 428]

JURY—*continued.*

— Trial by—Settlement of issues - - - 429
See **ISSUES.**

KELP—Facilities for obtaining seaweed for—
Fair rent - - - - - 20
See **LAND LAW (IRELAND) ACTS.** 1.

LACHES—Mortgagee - - - - - 388
See **FOLLOWING ASSETS.**

LAND LAW (IRELAND) ACTS—*Fair rent*—“*Circumstances of the case, holding and district*”—*Facilities for obtaining seaweed for the manufacture of kelp.*] Where an agricultural holding is situated in a district in which the production of kelp is a recognised industry, and a source of profit, the facility enjoyed by the tenant, by virtue of his tenancy, for taking suitable seaweed from the seashore, for the manufacture of kelp, is to be taken into consideration in fixing the fair rent of the holding. Decision of the Irish Land Commission affirmed. *Nolan, landlord; Lee, tenant. Berridge, landlord; Folan, tenant* - - - APP. 20

2. — *Resumption of holding by landlord*—*Reasonable and sufficient purpose*—*Acquisition of summer run for purpose of introducing breed of Highland cattle.*] The landlord sought to resume possession of a holding, consisting of 524 acres of mountain, for the purpose of extending and developing a herd of West Highland cattle, which he had introduced, with a view to improving the cattle raised in the district:—*Held*, by the Court of Appeal (Lord Ashbourne, C., and Fitz Gibbon, and Holmes, L.J.J.; Walker, L.J., *dubitante*), that the purpose was reasonable and sufficient, having relation to the good of the holding, or of the estate, within the meaning of section 5 of the Land Act, 1881, and that the landlord was entitled to resume. *Montgomery, landlord; Foy, tenant*

[**LAND COM. 4; APP. 7**

3. — *Superior interest*—*Head rent*—*Redemption price*—*Principles on which to be assessed.*] When lands subject to a superior interest, consisting of a fee-farm rent, have been sold to the occupying tenants through the Court, the redemption price of the rent is to be fixed at the price or sum which appears, upon due consideration of all the circumstances of the case—of the selling prices of similar interests, of the value of money, and of the fact that the redemption is compulsory—to be the fair value thereof; but the amount of the price ought not to be affected by the consideration of indemnifying the owner of the rent against loss of income by reason of the difference between the annual income of any investment or class of investments in which the redemption money might be invested. *In re Leader's Estate; Coleman, petr.*

[**APP. 368**

4. — *Tenant for life and remainderman*—*Percentage under 3 Edw. 7, c. 37, s. 48—Vendor.*] The percentage payable to the vendor of an estate,
2 Z

LAND LAW (IRELAND) ACTS—*continued.*
out of the Land Purchase Aid Fund, under section 48 of the Irish Land Act, 1903, where the vendor is tenant for life only, or a trustee for sale, is bound by the trusts of the settlement. *Semble*: The powers of sale conferred by the Settled Land Acts are supplementary to those in the Land Purchase Acts. *In re Ely's Estate* - - - Ross, J. 66

5. — *Trust for sale—Tenant for life—Sale to tenants—Leave of Court—Bonus—Irish Land Act, 1903, s. 48 (3 Edw. 7, c. 37)—Irish Land Act, 1904, s. 3 (4 Edw. 7, c. 34)—Settled Land Act, 1882, s. 63 (45 & 46 Vict. c. 38)—Settled Land Act, 1884, s. 7 (47 & 48 Vict. c. 18).*] Where a person who is, under section 63 of the Settled Land Act, 1882, to be deemed tenant for life, has entered into agreements with the tenants to sell to them under the provisions of the Irish Land Acts, 1903, 1904, and applies to the Court, under section 7 (ii) of the Settled Land Act, 1884, for leave to sell, if the proposed sale is otherwise proper and advantageous to all parties, the Court will not deprive the tenant for life of his power to sell merely because the bonus payable under section 48 of the Irish Land Act, 1903, will be paid to him as his absolute property, under section 3 of the Irish Land Act, 1904. *In re Iever's Settlements* - - - BARTON, J. 492

— Character of holding—Covenant to maintain in grass for last three years of term
See CHARACTER OF HOLDING. [550, 559]

— Superior interest—Settlement affecting—Appointment of trustees - - - 237
See TRUSTEE.

— Tenant for life—Agreement fixing fair rent—Lessee bound to accept renewal 290
See COVENANT TO RENEW.

— Tithe rentcharge—Redemption—Assessment of price—Appeal - - - 496, 500
See TITHE RENTCHARGE. 2.

LANDLORD AND TENANT—Apportionment of rent—Compulsory purchase—Defence Acts - - - - - 354
See COMPULSORY PURCHASE.

— Land Law (Ireland) Acts.
See LAND LAW (IRELAND) ACTS.

— Lease.
See LEASE.

— Local registration of title—Middleman barred by Statute of Limitations 1
See LOCAL REGISTRATION OF TITLE.

— Salvage payment by sub-tenant—Contribution—Time at which value is to be ascertained - - - - - 341
See CONTRIBUTION.

LAPSE OF TIME—Creditor claiming to follow assets - - - - - 388
See FOLLOWING ASSETS.

LAPSE OF TIME—*continued.*

— Payment of quit rent by persons not liable—Lost grant - - - - - 474, 480
See LOST GRANT.

LEASE—Building—Scale of charges - 570
See BUILDING LEASE.

— Covenant not to follow business of publican—Not broken by trading as spirit grocer
See SPIRIT GROCCER. [206]

— Covenant to maintain in grass for last three years of term - - - - - 550, 559
See CHARACTER OF HOLDING.

— Implied covenant to accept renewal - 290
See COVENANT TO RENEW.

— Renewable—Owner of reversion a lunatic—Execution of fee-farm grant - 147
See LUNATIC.

— Tenant for life—Breach of covenant to repair—Sale by trustee—Indemnity - 240
See TENANT FOR LIFE AND REMAINDERMAN. 1.

LEAVE TO SELL—Tenant for life—Trust for sale—Bonus - - - - - 492
See LAND LAW (IRELAND) ACTS. 5.

LEGACY—Specific - - - - - 155, 519
See SPECIFIC LEGACY. 1, 2.

— To executor—Implied trust for next-of-kin
See EXECUTOR. [486]

LEGATEE—Misdescription - - - - - 98
See MISDESCRIPTION.

— Mortgagee—Claim on testator's covenant—Following assets - - - - - 388
See FOLLOWING ASSETS.

LEGITIMACY.
See ILLEGITIMACY.

LIEN—Unpaid purchase-money - - - - - 530
See VENDOR'S LIEN.

LIMITATIONS, STATUTE OF—Title acquired by—Registration - 1
See LOCAL REGISTRATION OF TITLE.

LIS PENDENS—Legal mortgage executed *pendente lite* - - - - - 461
See PRIORITY. 1.

LOAN FUND SOCIETY—*Debentures—Payment of—Winding-up—Priority—Payment pari passu.*] Debentures issued by a Loan Fund Society, established under 6 & 7 Vict. c. 91, are, in the event of the society being wound up, payable *pari passu*, and are not entitled to rank in priority of their respective dates of issue. *Stewart v. O'Neill* - - - - - APP. 87

LOCAL REGISTRATION OF TITLE—*Statute of Limitations—Acquisition of middle interest by sub-tenant.*] Where the Statute of Limitations runs against a middleman, the occupying tenant, in whose favour the statute has run, acquires the middle interest, and is entitled to be registered as owner thereof, under the Local Regis-

LOCAL REGISTRATION OF TITLE—continued.

tration of Title (Ireland) Act, 1891. *In re Hayden* - - - MADDEN, J. 1

LOCKE KING'S ACT—Effect of payment of mortgage out of personal estate—Time at which lien on lands is created 461
See PRIORITY. 1.

LOST GRANT—*Presumption of—Quit rent—Covenant to pay—Payment for years by persons not liable.*] By indenture of 23rd June, 1703, the Trustees of Forfeited Estates conveyed to *D.* the lands of Clonfad, Rattin, and Ballyoughter, in the County of Westmeath, in fee, subject to payment of the quit rent of £12 13s. In 1708 *H.* (in whom *D.*'s interest in the lands was vested) granted to *B.* the lands of Clonfad, in fee, subject to the rent of £135 over and above taxes, except quit rent, which *H.* covenanted to pay. In 1710 *H.* granted to *B.* the lands of Rattin, subject to the rent of £80, with the same provision as to quit rent, which *H.* covenanted to pay. Since 1780 the quit rent payable in respect of Rattin and Clonfad had been paid by the successive owners of the grantee's interest under the fee-farm grants of 1708 and 1710:—*Held*, that in the absence of any explanation of these payments being made by parties not liable thereto for so long a period, a lost grant must be presumed. Decision of Ross, J., affirmed. *In re Bomford's Estate*; *Neville, petitioner.*

[Ross, J. 474; App. 480

LUNATIC—*Renewable Leasehold Conversion Act* (12 & 13 Vict. c. 105, ss. 1, 17, 35)—*Owner a lunatic so found—Fee-farm grant—Execution by committee alone—Receiver—Jurisdiction in lunacy matters.*] Where the owner of the reversion expectant on the determination of a lease for lives renewable for ever has been found lunatic, and a receiver and a committee of his estate appointed in the Lunacy matter, the committee alone is the proper party to execute a fee-farm grant under the Renewable Leasehold Conversion Act in lieu of the lease. Nature of the jurisdiction in Lunacy explained. *In re Lahiff* - - - LUNACY 147

MANAGEMENT—*Infants' estate—Trustees—Authorized to mortgage* - - - 513
See SALVAGE EXPENSES.

MARSHALLING—*Mortgage—Legacies charged on lands—Mortgage of portion of lands charged—Covenant against incumbrances—Payment of legacies out of proceeds of sale of mortgaged lands.*] *A B* devised Blackacre and Whiteacre to *C D*, subject to legacies in favour of *M N*. *C D* mortgaged Whiteacre to a Bank to secure £7000. The mortgage contained a covenant against incumbrances. After *C D*'s death, in an action to administer his real and personal estate, Whiteacre was sold, and the legacies were paid out of the proceeds of the sale, thereby nearly sweeping away

MARSHALLING—continued.

the fund out of which the mortgage debt was payable. Blackacre was subsequently sold, and it was held by the Court of Appeal (reversing the decision of the Master of the Rolls) that the mortgagees were, under the doctrine of marshalling, entitled to resort to the fund produced by the sale of Blackacre for payment of the mortgage in priority to simple contract creditors of the deceased *C D*. *Quære*, whether the other circumstances above stated, apart from the covenant against incumbrances contained in the mortgage, would have entitled the Bank to resort to the proceeds of the sale of the unmortgaged lands. *M'Carthy v. M'Cartie* (No. 2) - - - M. R. 100; App. 113

MERGER—Payment of charge by tenant for life—Release—Intention - - - 130, 146

See TENANT FOR LIFE AND REMAINDERMAN. 2.

MIDDLEMAN—Barred by Statute of Limitations - - - - - 1

See LOCAL REGISTRATION OF TITLE.

MINERAL WATER—Use of embossed bottles of other manufacturers—Labels denoting actual manufacturers - - - 310, 321

See TRADE MARK.

MISDESCRIPTION—*Will—Construction—Legatee.*] A testator devised his property in trust to pay, *inter alia*, a legacy of £500 to his "godson, the Hon. *H. A. J. P.*, son of Lord *G.*" His godson was in reality the Hon. *R. M. P.*, another son of Lord *G.*:—*Held*, that the legacy passed to the godson, the Hon. *R. M. P.* *In re Blake's Trusts* [V.-C. 98

— Specific legacy—Mistake as to subject matter—Legacy deemed general - - - 519

See SPECIFIC LEGACY. 1.

MISTAKE—Release of charge—Merger 130, 146
See TENANT FOR LIFE AND REMAINDERMAN. 2.

MORTGAGE—Claim on covenant—Following assets after distribution—Laches—Acquiescence - - - - - 388
See FOLLOWING ASSETS.

— Discharged out of personal estate—*Locke King's Act* - - - - - 461
See PRIORITY. 1.

— Equitable.

See EQUITABLE MORTGAGE.

— Executed *pendente lite* - - - - - 461
See PRIORITY. 1.

— Judgment against executors of mortgagor—Insolvent estate—*Judicature Act*, 1877, sect. 28, sub-sect. 1 - - - 376
See INSOLVENT ESTATE. 1.

— Legacies charged on land—Covenant against incumbrances—Marshalling against simple contract creditors of mortgagor
See MARSHALLING. [100, 113

MORTGAGE—*continued.*

— Proof of debt—Insolvent estate—Payments made by receiver, and out of proceedings of sale of mortgaged lands - 299

See **INSOLVENT ESTATE**. 2.

— Trustees—Infants' estate—Expenses of management - - - 513

See **SALVAGE EXPENSES**.

NEXT-OF-KIN—Implied trust for—Bequest to executor - - - 486

See **EXECUTOR**.

NOTICE—Purchaser without - 280, 461

See **PRIORITY**. 1, 2.

NUISANCE—*Sewage—Sewer—Sanitary authority—Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52), s. 274—Parties—Injunction—Costs.*

By permission of the plaintiff the Corporation of Cork had for many years discharged surface water from a public road, through a drain belonging to the Corporation, into a pond on the plaintiff's land. Subsequently, as the drain became offensive, it was, at the plaintiff's request, diverted into a cesspool made by the Corporation on his land. By direction of the Corporation the defendant *H.* connected some newly-built houses belonging to him with the drain, and the sewage from these houses was accordingly discharged into the plaintiff's lands through the drain. The plaintiff had given no permission to the defendants to discharge this sewage on his premises:—*Held* (affirming the judgment of the Vice-Chancellor), that the plaintiff was entitled to an injunction against the Corporation and the defendant *H.*, restraining them from discharging sewage on his lands, and to a mandatory injunction to disconnect the said houses from the said drain, but that the Corporation should pay the costs both of the plaintiff and of *H.* *Gibbings v. Hungerford and Lord Mayor and Burgesses of Cork* APP. 211

2. — *Smallpox hospital—Residential district—Injunction.*] Action for an injunction to restrain the defendants from erecting a smallpox hospital on lands situated near the village of *C.*, county Dublin, in the urban district of Rathmines. There were 137 houses, with about 753 inhabitants, within a quarter of a mile; and 422 houses, containing about 2321 inhabitants, and four public institutions, with about 361 residents, within a half mile, of the proposed hospital. There was nothing to show that the defendants were precluded from selecting a site outside their respective districts, if necessary, or that they had attempted to do so. There was conflicting expert evidence as to the suitability of the site selected, and as to the risk of the spread of smallpox from a smallpox hospital, by reason of the possibility of the disease being carried without actual contact through the air for a considerable distance:—*Held*, by the Court of Appeal (reversing the decision of the Vice-Chancellor), that an injunction should not be granted. *The Attorney-General*

NUISANCE—*continued.*

(*Boswell*) v. *Rathmines and Pembroke Joint Hospital Board* - - - V.-C. 161; APP. 171

OPTION TO PURCHASE—*Will—Gift on condition—Interest transmissible to executor of person to whom option is given.*] Devise of house and farm of land to testator's wife for life, and at her decease "I desire that my brother *A.* shall get the entire of said house and lands, together with the plough and winnowing machine, at £8 sterling per statute acre. . . . If my brother *A.* will not take the land at £8 an acre, together with the buildings, &c., they are then to be sold by public auction." *A.* predeceased testator's widow, having bequeathed to his son *J.* "all my interest and goodwill in my deceased brother's farm, together with the plough and winnowing machine":—*Held* (on the death of the widow, in 1903), that there was a gift of property to *A.* on the condition of paying a price for it, and that this option was exercisable by his executor after his death. *Belshaw v. Rollins*

[M. R. 284

ORDER—Made in Chambers—Motion to discharge - - - 120

See **TIME**.

ORDERS, GENERAL, 1891 (19th January)—Supreme Court—XXV. R. 5 - 434

See **ILLEGITIMACY**.

— LVIII. R. 15 - - - 120

See **TIME**.

— 1884 (16th April)—Solicitors' remuneration—Schedule I., Part II. - - 570

See **BUILDING LEASE**.

PASTORAL HOLDING—Lease—Covenants

See **CHARACTER OF HOLDING**. [550, 559

PAYMENT—By third party - - 299

See **INSOLVENT ESTATE**. 2.

— Of charge by tenant for life—Presumption—Expression of intention to keep in existence - - - 130, 146

See **TENANT FOR LIFE AND REMAINDERMAN**. 2.

— Of quit rent by persons not liable—Covenant—Presumption of lost grant 474, 480

See **LOST GRANT**.

PERCENTAGE—Land Act, 1903, sect. 48—Tenant for life - - - 66, 492

See **LAND LAW (IRELAND) ACTS**. 4, 5.

PERPETUAL ESTATE—Tithe rentcharge

See **TITHE RENTCHARGE**. 1. [272

PERPETUITY—Execution of power—Vesting

See **EXECUTION OF POWER**. 2. [452, 460

POWER—Execution of—Vesting—Remoteness

See **EXECUTION OF POWER**. 2. [452, 460

— Special—Execution - - - 42

See **EXECUTION OF POWER**. 1.

PRACTICE—Administration action—Insolvent estate—Judgments against executor 376

See **INSOLVENT ESTATE**. 1.

PRACTICE—*continued.*

- Administration action—Insolvent estate—
Secured creditor - - - 299
See **INSOLVENT ESTATE**. 2.
- Chambers—Order in—Time for moving to
discharge - - - 120
See **TIME**.
- Settled Land Acts—Trust for sale—Leave to
tenant for life to sell—Bonus - 492
See **LAND LAW (IRELAND) ACTS**. 5.
- Settlement of issues - - - 429
See **ISSUES**.
- Trial by jury - - - 400, 428
See **TRIAL**.

PRESUMPTION—Paternity—Evidence to rebutSee **ILLEGITIMACY**. [434]

- Payment of charge by tenant for life 130, 146
See **TENANT FOR LIFE AND REMAINDER-
MAN**. 2.
- Payment of quit rent by persons not liable—
Lost grant - - - 474, 480
See **LOST GRANT**.

PRICE—Superior interest—Principle on which
to be assessed - - - 368, 496, 500
See **LAND LAW (IRELAND) ACTS**. 3.
TITHE RENTCHARGE. 2.**PRIORITY**—*Conflicting equities—Equitable mort-
gage—Subsequent legal mortgage—Lis pendens—
Locke King's Act—Breach of trust not amounting
to fraud—Cestui que trust bound by acts of trustees.*]

A died seized and possessed of lands, including a denomination *X*, and indebted to his bank in the sum of £10,000, to secure which all his title deeds, including those of *X*, had been deposited with the bank by way of equitable mortgage. *A* made a will, whereby, in effect, *X* became the property of his eldest son, *B*. He left other lands to his two younger sons, and pecuniary legacies of £1000 each to his three daughters, one of whom was the petitioner. He appointed *B* and two others executors and trustees, to whom probate was granted. Within nine months after his death the executors paid off the testator's debt to the bank, and obtained the title deeds, giving a receipt to the bank for them; but on the same day the title deeds of *X* were re-deposited by *B* with the bank to secure a past debt of his own and future advances. Upon this large advances were made by the bank to *B*, far more than sufficient to exhaust the value of *X*. *A* suit, instituted in the Chancery Division to establish the right of the legatees to be paid out of *X*, was registered as a *lis pendens*, and immediately afterwards the bank took a legal mortgage of *X* from *B*:—*Held*, that, under Locke King's Act, as each payment was made an equity arose in favour of the legatees in the nature of an equitable charge against *X*, to be recouped the amount necessary for payment in full of the legacies which the remain-

PRIORITY—*continued.*

ing personal estate was insufficient to discharge. But *held* also, following *In re E French's Estate* (21 L. R. Ir. 283) and *In re Sloane's Estate* ([1895] 1 L. R. 146), that the conduct of the trustees, though constituting a breach of trust, was not fraudulent, and that, irrespective of the legal mortgage, the bank, as purchasers for value without notice, obtained by their equitable mortgage priority over the earlier equitable charge of the legatees. *Shropshire Union Railways and Canal Co. v. Reg.* (L. R. 7 H. L. 496) distinguished. *In re Bobbett's Estate; Nugent, petitioner* - - - Ross, J. 461

2. — *Conflicting equities—Settlement—Trust fund—Cestui que trust—Advance—Absence of notice—Blended fund.*] The trustees of a marriage settlement applied to a bank for an advance to enable them to complete the purchase of certain house property, agreeing to deposit the title deeds thereof (with others) as security. The trustees received the advance from the bank, blended it with trust money in their hands, and purchased the property therewith. The bank had no notice of any trust. On the date of the advance the trustees deposited the title deeds of the purchased property with the bank. The property was subsequently sold at a loss, and the proceeds lodged in Court:—*Held*, that the bank had the superior equity, and were entitled to be paid the amount of their advance, with interest, in priority to the claim of the *cestuis que trustent*. *Bourke v. Lee* M. R. 280

— Executor's authorised trading—Costs, charges and expenses - - - 334, 340
See **TRADING BY EXECUTOR**.

— Judgments against executor—Insolvent estate—Payment *pari passu* - 376
See **INSOLVENT ESTATE**. 1.

— Loan Fund Society—Debentures—Winding-up—Payment *pari passu* - - 87
See **LOAN FUND SOCIETY**.

— Mortgage with covenant against incumbrances—Simple contract creditors of mortgagor - - - 100, 113
See **MARSHALLING**.

PROOF OF DEBT—Secured creditor - 299
See **INSOLVENT ESTATE**. 2.

PROSPECTUS—Representations in—Contract excluding vendor's lien - - 530
See **VENDOR'S LIEN**.

PUBLIC HEALTH ACT, 1878—Nuisance caused by Sanitary Authority - 211
See **NUISANCE**. 1.

PUBLICHOUSE—Covenant not to use demised premises as—Trading as spirit grocer
See **SPIRIT GROCER**. [206]

QUIT RENT—Payment for lengthened time by persons not liable—Covenant—Lost grant
See **LOST GRANT**. [474, 480]

- RECEIVER**—In lunacy matter—Whether necessary party to fee-farm grant - 147
See LUNATIC.
- REDEMPTION OF RENT**—Obligation to accept renewal of lease—Limited owner of reversion - - - 290
See COVENANT TO RENEW.
- Superior interest—Price of—Principle upon which to be ascertained - - 368
See LAND LAW (IRELAND) ACTS. 3.
- Tithe rentcharge—Price of—Principle of assessment—Appeal - 496, 500
See TITHE RENTCHARGE. 2.
- REFUNDING**—Legatees—Claim of mortgagee to follow assets - - - 388
See FOLLOWING ASSETS.
- RELEASE**—Charge held to be in existence notwithstanding - - - 130, 146
See TENANT FOR LIFE AND REMAINDERMAN. 2.
- REMOTENESS.**
See PERPETUITY.
- RENEWABLE LEASE**—Covenant to renew
See COVENANT TO RENEW. [290]
- Owner of reversion a lunatic—Execution of fee-farm grant - - - 147
See LUNATIC.
- RENT**—Apportionment—Date of - - 354
See COMPULSORY PURCHASE.
- Redemption of - - - 290, 368
See COVENANT TO RENEW.
- Land Law (IRELAND) ACTS. 3.
- Salvage payment—Contribution - 341
See CONTRIBUTION.
- RESIDENTIAL HOLDING**—Land Law Acts
See CHARACTER OF HOLDING. [550]
- RESIDUE**—Bequest to executors—Implied trust for next-of-kin - - - 486
See EXECUTOR.
- RESUMPTION OF HOLDING**—Reasonable and sufficient purpose - - 4, 7
See LAND LAW (IRELAND) ACTS. 2.
- SALVAGE EXPENSES**—*Will—Settled estate—Mortgage—Trustees—Management—Powers—Cestuis que trustent—Infants—Real estate—Jurisdiction.* A sum of £125,000, portion of trust property held in trust for beneficiaries (the shares of some being in settlement, and some of them being infants), was invested in a mortgage on a sheep farm in Australia. The mortgagor had purchased the farm for £450,000, and had expended considerable sums thereon. Owing to the great drought in Australia, the farm deteriorated, and the mortgagor got into difficulties, and became unable to pay interest on the mortgage. There was an attempted sale by the mortgagor, but there was no bidding, and the farm was unoccupied. The trustees of the trust property had taken proceedings in the Australian Court for foreclosure, and the decree
- SALVAGE EXPENSES**—*continued.*
 would shortly be made absolute. The vacant farm was deteriorating; but rain had fallen, and there was promise of better seasons. The mortgaged property was subject to land tax and penalties for not keeping down rabbits:—*Held*, that the Court had jurisdiction to, and would, under the circumstances of the case, allow the trustees to raise, by mortgage of the sheep farm itself, £30,000 for the expenses of working and managing the farm, and paying outgoings. *Neill v. Neill*
 [KENNY, J., for M.R. 513]
- One of several sub-tenants paying headrent—Principle of contribution - - 341
See CONTRIBUTION.
- SANITARY AUTHORITY**—Nuisance—Discharge of sewage - - - 211
See NUISANCE.
- SEAWEED**—Facilities for obtaining—Fair rent
See LAND LAW (IRELAND) ACTS. 1. [20]
- SECURED CREDITOR**—Insolvent estate—Proof of debt—Payments by third party
See INSOLVENT ESTATE. 2. [299]
- SERVICE OUT OF THE JURISDICTION**—Equitable Civil Bill - - - 123
See COUNTY COURT.
- SETTLED LAND.**
See TENANT FOR LIFE AND REMAINDERMAN.
- SETTLEMENT**—After-acquired property—Bequest—Restraint on anticipation - 328
See AFTER-ACQUIRED PROPERTY.
- Form of—Direction in will - - 360
See DIRECTION TO SETTLE.
- Including superior interest—Appointment of trustees—Jurisdiction of Land Commission - - - 237
See TRUSTEE.
- Power—Execution of—Remoteness 452, 460
See EXECUTION OF POWER. 2.
- SEWAGE**—Discharge of—Nuisance - 211
See NUISANCE. 1.
- SMALLPOX HOSPITAL**—Residential district—Alleged nuisance - 161, 171
See NUISANCE. 2.
- SOLICITOR**—Building lease—Scale of charges
See BUILDING LEASE. [570]
- SPECIFIC LEGACY**—*Deemed general legacy—Will—Mistake—Misdescription—Extrinsic evidence.* A testatrix lent £21,000 to A. F. & Co., a firm of which A. S. F. and W. F. were partners. The firm of A. F. & Co. ceased to exist in 1899, when a Limited Liability Company was formed, which took over its business. Testatrix was allotted debenture stock and shares in the new Company in respect of her debt. By will, in 1903, testatrix made the following bequest:—"To A. S. F. and W. F. I forgive the sum of £20,000 now owing to me jointly by them, or any member of the firm":—

SPECIFIC LEGACY—*continued.*

Held, that *A. S. F.* and *W. F.* were entitled to be paid £20,000 out of the general assets of the testatrix. *Lindgren v. Lindgren* (9 Beav. 358) and *Selwood v. Mildmay* (3 Ves. 306) followed.

Findlater v. Lowe - - - M. R. 519

2. — *Will—Construction—Ejusdem generis*—*“All my household furniture and effects in my residence”*—*Wool* in store forming part of residence.]

A testator bequeathed his house in Abbey-street to his son for life, and, after intervening provisions, bequeathed to him “all my household furniture and effects in my residence, Abbey-street, aforesaid.” At the time of the testator’s death there was a large quantity of wool, part of his stock-in-trade, stored in a store which was at the rear of and admittedly formed part of his residence. The will contained a residuary bequest:—*Held*, that the wool did not pass under the bequest to the son, but was included in the residuary gift. *MacPhail v. Phillips* - - - BARTON, J. 155

SPIRIT GROCER—*Lease—Covenant not to use or follow the trade or business of a publican—Licensed spirit grocer.*] A covenant by the lessee in a lease not to use or follow the trade or business of a publican is not broken by his trading as a licensed spirit grocer on the premises. *In re Cullen and Riall’s Contract* - BARTON, J. 206

STATUTES—

1 & 2 Vict. c. 109—Tithe rentcharge, ss. 7, 9

See **TITHE RENTCHARGE**. 1. [272]

8 & 9 Vict. c. 18—Lands Clauses, s. 119 354

See **COMPULSORY PURCHASE**.

12 & 13 Vict. c. 105—Renewable Leasehold Conversion, ss. 1, 17, 35 - - - 147

See **LUNATIC**.

17 & 18 Vict. c. 113—Locke King’s, s. 1 461

See **PRIORITY**. 1.

21 & 22 Vict. c. 27—Chancery Amendment, s. 4

See **ISSUES**. [429]

40 & 41 Vict. c. 56—County Courts and Officers, ss. 33, 34 - - - 123

See **COUNTY COURT**.

40 & 41 Vict. c. 57—Supreme Court of Judicature (Ireland), sect. 28, sub-s. 1 299, 376

See **INSOLVENT ESTATE**. 1, 2.

— s. 42 - - - 429

See **ISSUES**.

41 & 42 Vict. c. 52—Public Health, s. 274 211

See **NUISANCE**. 1.

44 & 45 Vict. c. 41—Conveyancing and Law of Property, sect. 42, sub-s. 1 - 18

See **INFANT**.

44 & 45 Vict. c. 49—Land Law, s. 5 - 4, 7

See **LAND LAW (IRELAND) ACTS**. 2.

— s. 8 - - - 20

See **LAND LAW (IRELAND) ACTS**. 1.

45 & 46 Vict. c. 38—Settled Land, s. 25 513

See **SALVAGE EXPENSES**.

STATUTES—*continued.*

45 & 46 Vict. c. 38—Settled Land, s. 63 492

See **LAND LAW (IRELAND) ACTS**. 5.

47 & 48 Vict. c. 18—Settled Land, s. 7 492

See **LAND LAW (IRELAND) ACTS**. 5.

50 & 51 Vict. c. 28—Merchandise Marks, sect. 2

sub-s. 2 - - - 310, 321

See **TRADE MARK**.

50 & 51 Vict. c. 33—Land Law, ss. 1, 3 290

See **COVENANT TO RENEW**.

54 & 55 Vict. c. 57—Redemption of Rent, s. 1

See **COVENANT TO RENEW**. [290]

59 & 60 Vict. c. 47—Land Law, s. 5 (1), (v.)

See **CHARACTER OF HOLDING**. [550, 559]

3 Edw. 7, c. 37, s. 24 (6), (13) - 496, 500

See **TITHE RENTCHARGE**. 2.

— s. 33 (1) - - - 237

See **TRUSTEE**.

— s. 48 - - - 66, 492

See **LAND LAW (IRELAND) ACTS**. 4, 5.

4 Edw. 7, c. 34—Land Law, s. 3 - 492

See **LAND LAW (IRELAND) ACTS**. 5.

SUB-TENANT—Payment of head rent—Contribution - - - 341

See **CONTRIBUTION**.

— Title acquired by Statute of Limitations

against middleman—Registration 1

See **LOCAL REGISTRATION OF TITLE**.

SUPERIOR INTEREST—Land Commission—

Jurisdiction to appoint new trustees of

settlement, comprising - - - 237

See **TRUSTEE**.

— Redemption—Principle on which price is to be

ascertained - - - 368, 496, 500

See **LAND LAW (IRELAND) ACTS**. 3.

TITHE RENTCHARGE. 2.

SURVIVOR—*Will—Annuity—Gift to grandchildren during their lives—Implied gift to survivor.*]

A testator was possessed of a perpetual annuity of £33 4s. 8d. out of the lands of *L.* By his will the testator bequeathed to each of his grandchildren, *M.*, *F.*, and *E.*, £11 1s. 7d. yearly during their lives, and directed that after the death of all his said grandchildren, the *L.* annuity of £33 4s. 6d. was to devolve upon his son *W.* The annual sum of £11 1s. 7d. was one-third of the *L.* annuity.

M. and *F.* died, leaving *E.* and *W.* surviving:—*Held*, that the annual sums of £11 1s. 7d. payable to *M.* and *F.* were not undisposed of after their deaths, and that *E.*, the surviving grandchild, was entitled to them during her life. *M^c Dermott v. Wallace* (5 Beav. 142) followed. *Lill v. Lill* (23 Beav. 446) distinguished. *Jennings v. Hanna* [M. R. 540]

2. — *Will—Construction—Other—Gift over—Context.*] By his will a testator gave legacies in trust for his three illegitimate children—£400 for

SURVIVOR—continued.

T., £300 for *R.*, and £400 for *E.*, a married woman, for her separate use. The will then provided as follows:—"And in case of the decease of any or either of them, the said *T.*, *R.*, and *E.*, without issue, or leaving issue who shall not live to attain his, her, or their age of twenty-one years, I order and direct that the said several and respective sum and sums of money so hereby left and bequeathed to and for them, the said *T.*, *R.*, and *E.*, shall go and be equally divided between the survivors and survivor of them, for and during the term of their natural lives, and to their issue after their respective deaths who shall live to attain the age of twenty-one years." There was no gift over in the event of all the three legatees dying without issue. The will appointed a brother of the testator (who predeceased him) residuary legatee. *R.*, who was unmarried, predeceased the testator. A suit was brought for the administration of testator's estate, and the assets were lodged in Court, and proved insufficient to pay the legacies which had to abate rateably. *E.* died in 1865, leaving children, all of whom attained twenty-one. *T.* died in 1900, unmarried. At the date of *T.*'s death the funds in Court represented a moiety of the legacy of £300 given to *R.*, with a bequest over, and the legacy of £400 originally bequeathed to *T.*, with a gift over. The children of *E.* applied for payment out of the funds in Court:—*Held*, on the construction of the will, that the children of *E.* took no interest in the funds in Court, in which *T.* had a life interest, because their mother did not survive him, and that the word "survivor" must be read in its ordinary signification, and not as meaning "other," with the result that there was an intestacy as regards these funds. *Garland v. Smyth*

[M. R. 35; APP. 41]

TAXATION OF COSTS—Building lease 570

See BUILDING LEASE.

TENANT FOR LIFE AND REMAINDER-

MAN—Leaseholds—Covenant to repair—Liability of equitable tenant for life—Vendor and purchaser—Sale by trustee—Indemnity—Rescission.] As between the equitable tenant for life of leaseholds and the remainderman, the tenant for life is liable for breaches of covenant to repair committed during the existence of the life estate, and the liability for such breaches cannot be thrown by the tenant for life upon the *corpus* of the estate. Where a trustee of leaseholds sold the premises, and the purchaser covenanted to indemnify the trustee and the tenant for life against certain judgments recovered against the tenant for life by the head landlord in respect of breaches of the covenant to repair contained in the head lease, committed by the tenant for life:—*Held*, that that was a circumstance which justified a purchaser from a vendor, claiming under such an assignment, in seeking a

TENANT FOR LIFE AND REMAINDER-**MAN—continued.**

rescission of the contract and return of his deposit.
In re Waldron and Bogue's Contract

[BARTON, J. 240]

2. — *Payment by tenant for life of charge on inheritance—Release of lands—Merger—Erroneous belief—Presumption of intention to keep charge alive—Expression of intention.]* A tenant for life of real estate paid off a charge on the fee, and took an absolute release of his estate in the lands, with the intention of extinguishing the charge, under an erroneous belief that he was owner in fee of the lands. He subsequently became aware that he was only tenant for life, and he consulted his solicitors, with the view (if possible) of keeping the charge alive for his own benefit, and a case was sent to counsel in reference to the matter, who advised proceedings in Chancery, which, however, the tenant for life declined to bring. He made no mention of the charge in his will. There was conflicting evidence as to various expressions of his intention, made subsequent to the payment off of the charge. After his death his executors brought an action to raise the charge as portion of his assets:—*Held*, that, notwithstanding the release of the lands and the other circumstances of the case, the tenant for life was entitled, on discovering his error, to keep the charge alive against the inheritance, and that his subsequent acts and declarations sufficiently evidenced that intention. *Conolly v. Barter* - - - M. R. 130; APP. 146

— Agreement with tenant for life fixing fair rent
— Renewable leasehold—Waiver of right to enforce renewals - - - 290
See COVENANT TO RENEW.

— Bonus under Land Act, 1903, sect. 48 66

See LAND LAW (IRELAND) ACTS. 4.

— Leave to tenant for life to sell - 492

See LAND LAW (IRELAND) ACTS. 5.

TIME—For appeal—Order in Chamber—Motion to discharge—Final order—Judicature (Ireland) Order LVIII., Rule 15—Practice.] A motion to discharge or vary a final order made in Chamber must be brought within twenty-one days. *In re Giles* (43 Ch. D. 391) followed. *In re Long* (deceased), *Long v. Long* - - - M. R. 120

— For ascertaining value of contributory lots—
Salvage payment - - - 341

See CONTRIBUTION.

— Lapse of—Following assets—Laches 388

See FOLLOWING ASSETS.

— Lapse of—Lost grant—Presumption 474, 480

See LOST GRANT.

TITHE RENTCHARGE—1 & 2 Vict. c. 109, ss. 7, 9—Charge on "perpetual estate," not on fee-simple.] Tithe rentcharge is a burden on the first estate of inheritance, or the first perpetual estate equivalent thereto, and not on the fee-simple of

TITHE RENTCHARGE—*continued.*

the lands, unless the fee-simple is or becomes the first estate of inheritance. Accordingly, where the owner of a lease for lives renewable for ever, who, as owner of an estate equivalent to a perpetual estate, was liable to pay the tithe rentcharge, assigned his interest to a pauper in order to avoid liability to future rent, and default was made in payment of the tithe rentcharge by the assignee, it was held by the Court of Appeal, affirming the decision of the Master of the Rolls, that the arrears of the rentcharge could not be recovered from the owner in fee. *Irish Land Commission v. Annesley*

[APP. 272]

2. — *Land Purchase Acts*—*Improprate tithe rentcharge*—*Redemption price*—*Principles on which to be assessed*—*Judicial Commissioner*—*Appeal from*—*Jurisdiction*—*Irish Land Act, 1903* (3 Edw. 7, c. 37), section 24, sub-sections 6 and 13.] The Court of Appeal has jurisdiction, under sect. 24, sub-sects. 6 and 13, of the Irish Land Act of 1903, to hear an appeal from a Judicial Commissioner, as to the redemption price of impropriate tithe rentcharge. In ascertaining the price at which such tithe rentcharge ought to be redeemed, the Court ought to take into account, with other circumstances, (a) the value of ecclesiastical tithe rentcharges, (b) the value of money, and (c) the element of compulsory purchase. *In re Kemmis' Estate*

[MEREDITH, J. 496; APP. 500]

TRADE MARK—*Selling mineral waters not of plaintiffs' manufacture in bottles embossed with plaintiffs' name, registered as a trade mark, but bearing labels with defendants' name and address as manufacturers*—*No actual fraud or deception proved*—*Meaning of "innocently" in sect. 2, sub-sect. 2, of Merchandise Marks Act, 1887* (50 & 51 Vict. c. 28).] The plaintiffs were manufacturers of mineral waters in Dublin, which they sold to the trade in bottles embossed with their name, registered as a trade mark. The defendants, who were manufacturers of mineral waters in Limerick, received in the course of trade from their customers a large number of the plaintiffs' bottles so embossed, which they filled with mineral waters of their own manufacture, and sold to retailers, but with labels affixed bearing their own name and address as manufacturers, and stating the contents of the bottles. The defendants had not tried to pass off their mineral waters as the manufacture of the plaintiffs, nor was it proved that fraud was intended, or that any person had been deceived:—*Held* (affirming the decision of Sir A. M. Porter, M.R.), that the defendants, by filling bottles bearing the plaintiffs' trade mark with mineral waters of the defendants' manufacture, committed an offence against the Merchandise Marks Act, 1887, sect. 2, and that placing labels bearing the defendants' own name on the bottles did not exonerate them.

1904—Vol. I.

TRADE MARK—*continued.*

Thwaites & Co. v. M'Evilly; *Cantrell and Cochran v. Murphy and Bradshaw* M. R. 310; APP. 321

TRADING BY EXECUTOR—*Administration*—*Executor and trustee*—*Authorised trading*—*Costs, charges, and expenses*—*Indemnity*—*Deficient estate*—*Priority.*] An executor and trustee, who has been authorised to carry on the testator's business both by the will and by the Court, and who has properly incurred liabilities to trade creditors, is entitled to an indemnity in respect of such liabilities; and where the assets are deficient, the amount of such indemnity takes priority on allocation over the costs which had been awarded by the Court, on further consideration, to a plaintiff legatee. The trade creditors of the business stand in the shoes of the executor, and are subrogated to his rights of indemnity and priority. *Moore v. M'Glynn*

[BARTON, J. 334; APP. 340]

TRIAL—*Practice, Chancery Division*—*Action charging conspiracy*—*Plaintiff seeking for injunction and damages*—*Trial of issues and assessment of damages by jury.*] In an action charging several defendants with a conspiracy to compel the plaintiff to sell his property at a price below its value, by boycotting, threats, intimidation, and other unlawful means, the plaintiff sought to have the defendants restrained from doing the acts complained of by an injunction, and also asked for damages for the injuries already done. One of the defendants asked to have the issues of fact and the amount of damages ascertained and assessed by a jury:—*Held*, by the Court of Appeal (Lord Ashbourne, C., and Walker and Holmes, L.JJ.), that having regard to the nature of the case, and the dates of the several proceedings therein, the action must be treated as substantially an action for unliquidated damages, and that it was a proper case in which, in the exercise of its discretion, the Court should direct the issues of fact and the amount of damages to be ascertained and assessed by a jury. The judgment of the Court of Appeal affirmed by the House of Lords. *De Freyne v. Fitzgibbon and Others* (No. 1) APP. 400; H. L. 428

TRUST—*Executor and trustee carrying on trade*—*Deficient estate*—*Indemnity* 334, 340
See **TRADING BY EXECUTOR**.

— **EXECUTORY**—*Form of settlement* - 360
See **DIRECTION TO SETTLE**.

— **FOR next-of-kin**—*Gift of residue to executors*
See **EXECUTOR**. [486]

— **Right of cestui que trust to follow trust fund**
— **Mortgagee without notice**—**Conflicting equities**—**Priority** - 280, 461
See **PRIORITY**. 1, 2.

— **Settlement**—**Trust for sale**—**Leave to tenant for life to sell**—**Bonus** - 492
See **LAND LAW (IRELAND) ACTS**. 5.

TRUSTEE—Appointment—Settled Land Acts, 1882, 1890—Power of the Land Commission—Redemption price of superior interest—Land Law (Ireland) Act, 1896, sect. 33 (1).] The Irish Land Commission have power to appoint trustees of the settlement for the purpose of the Settled Land Acts, 1882 and 1890, to receive the redemption price of superior interests; such appointment will, however, be limited to such purpose. *In re Dames-Longworth's Estate* (26 Ir. L. T. 521) discussed. *In re Garde's Estate* (No. 2) - MEREDITH, J. 237

— Infants absolutely entitled—Management of land during minority - - 18
See INFANT.

— Infants' estate—Expenses of management—Mortgage authorised - - 513
See SALVAGE EXPENSES.

— Sale by—Leaseholds—Breaches of covenant to repair—Indemnity by purchaser—Objection to title derived under - 240
See TENANT FOR LIFE AND REMAINDERMAN. 1.

VALUE—Of contributory lots—Time when ascertainable—Salvage payment - 341
See CONTRIBUTION.

VENDOR AND PURCHASER—Sale by trustee with indemnity—Breach of covenant to repair—Objection to title—Rescission - - - 240
See TENANT FOR LIFE AND REMAINDERMAN. 1.

VENDOR'S LIEN—Contract excluding—Company—Prospectus—Waiver of lien.] By agreement, dated the 17th June, 1899, made between *W.* and *M.* and a Syndicate, it was agreed that *W.* and *M.* should sell to the Syndicate a brickfield for £13,000, of which £4000 was to be paid in cash, and £9000 in shares of a Company about to be formed. By agreement, dated the 23rd June, 1899, made between the Syndicate and the Company, the Syndicate agreed to sell to the Company the brickfield and premises for £25,000, of which £15,000 was to be paid in cash, and £10,000 in shares. By subsequent agreements *W.* and *M.* agreed to take payment of the entire of their purchase-money in shares, and the Syndicate agreed to take from the Company £21,500 in shares, and £3500 in cash. The capital of the Company was to consist of 30,000 ordinary shares of £1 each, and 1000 £5 per cent. first mortgage debentures of £10 each. The prospectus stated—"The debentures are solely applicable as working capital, and for the erection of further plant and machinery, and are secured by a charge on the leaseholds, rights, and assets of the Company." It also stated that the Syndicate, who had agreed to defray all preliminary expenses, had fixed the price at £25,000, of which £15,000 was to be payable in cash, and the balance in shares, "leaving the entire debenture issue of £10,000

VENDOR'S LIEN—continued.

available for working capital and new machinery." The brickfield and premises were assigned to the Company by *W.* and *M.* on the 30th August, 1899, though the deed was not executed by the Syndicate. The Company paid to the Syndicate £2676 on account of the £3500 (the portion of the purchase-money to be paid in cash), leaving a balance due of over £800. A considerable amount was subscribed for debentures, but the Company became abortive, and was wound up:—*Held*, that the Syndicate was not entitled to a lien for unpaid purchase-money in priority to the debenture-holders. *In re Durrow Brick and Tile Works Co.*

[APP. 530]

VESTING—Appointed share—Rule against perpetuities - - - 452, 460
See EXECUTION OF POWER. 2.

WAIVER—Vendor's lien - - - 530
See VENDOR'S LIEN.

WAY—Right of, by road built along seashore at foot of cliff—Irregular strip of land between foot of cliff and water table on inland side of the road—Boundary of highway—Right of public to deviate.] The public had for many years a right of way for all ordinary purposes from *K.* to *S.* and back along a road called "the Long Quay." The road ran by the seashore, and was bounded on one side by the shore, along which a protection wall had been built, against which the sea washed. At either side of the road there was a water table; inside the water table, on the land side, lay an irregularly shaped strip of waste ground between the water table and a cliff, which in some places approached to within 3 feet of the water table. Except the water table there was no boundary between the metalled road and this strip of ground. The level of the strip varied in different places, from one foot to a foot and a half above the surface of the road. The defendant admittedly owned the land above the cliff in fee-simple, and the deed which conveyed this land to him purported to convey also the strip of ground at the foot of the cliff, "subject to all rights existing into or upon the same, or any part thereof." The strip of land was not included in an agricultural lease made some years previously by the defendant's predecessor in title to the tenant, who still farmed the land above the cliff. The defendant had stored building materials on the strip of ground. Some of the inhabitants objected, and, claiming that the strip formed portion of the highway, sought an injunction to compel him to remove these materials;—*Held* (affirming the Vice-Chancellor), that the onus of showing that the waste strip of ground had been dedicated as part of the highway lay on the plaintiffs, and that as the evidence adduced showed no use by the public of the strip as a highway, and as there was no obstruction by the defendant of the metalled road at

WAY—*continued.*

the other side of the water table, the injunction should be refused. *Attorney-General (Cork County Council) v. Perry* V.-C. 247; App. 252

WILL—Condition—Gift on - - - 284

See OPTION TO PURCHASE.

— Condition—Whether precedent or subsequent
See CONDITION. [29, 271

— Direction to carry on trade—Executors' costs, charges, and expenses of so doing—

— Priority—Deficient estate 334, 340

See TRADING BY EXECUTOR.

— Direction to settle legatee's share in case of marriage—Strict settlement - 360

See DIRECTION TO SETTLE.

— Gift over on death of any or either of three legatees without issue—Death of all without issue - - - 35, 41

See SURVIVOR.

— Married Woman—Bequest to—Restraint on anticipation—Capital, whether payable to legatee, or to be retained by executors

See AFTER-ACQUIRED PROPERTY.

— Misdescription of legatee - - 98

See MISDESCRIPTION.

— Option to purchase—Interest transmissible to executor - - - 284

See OPTION TO PURCHASE.

— Power—Execution of—Intention to pass property - - - 42

See EXECUTION OF POWER. 1.

— Power—Execution of—Remoteness—Age of appointee at testator's death 452, 460

See EXECUTION OF POWER. 2.

WILL—*continued.*

— Specific legacy—Gift of "all my household furniture and effects in my residence in A. street"—Whether wool stored in part of testator's residence passed under this bequest - - - 155

See SPECIFIC LEGACY. 2.

— Specific legacy—Deemed general—Misdescription - - - 519

See SPECIFIC LEGACY. 1.

— Survivor—Implied gift to - - 540

See SURVIVOR. 1.

— Survivor—Not read "other" - - 35, 41

See SURVIVOR. 2.

WINDING-UP—Loan Fund Society—Debentures—Payment *pari passu* - 87

See LOAN FUND SOCIETY.

WORDS—"All household furniture and effects in my residence"—Will - - 155

See SPECIFIC LEGACY. 2.

— "Circumstances of the case, holding, or district"—44 & 45 Vict. c. 49, sect. 8 20

See LAND LAW (IRELAND) ACTS. 1.

— "Innocently"—Merchandise Marks Act, 1887, sect. 2, sub-sect. 2 - 310, 321

See TRADE MARK.

— "Strict settlement"—Will - - 360

See DIRECTION TO SETTLE.

— "Survivor"—Will - - 35, 41

See SURVIVOR. 2.

— "Which is let to be used wholly or mainly for the purpose of pasture"—Land Law Act, 1896, s. 5 (1) c. - 550, 559

See CHARACTER OF HOLDING.

THE END.

